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Virginia Allison Orr

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Federal Regulation of Green Marketing: Is It the Responsibility of the FTC, EPA or Both?

By
Virginia Allision Orr

B.M.Ed. May 1976, Illinois Wesleyan University
M.M. August 1982, University of Illinois
J.D. May 1985, University of Illinois

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Thesis directed by
Elizabeth Glass Geltman
Associate Professor of Law

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Is It the Responsibility of the FTC, EPA, or Both?

Introduction

With the advent of the environmental movement, consumers began to express an interest in purchasing products that had less of an adverse impact upon the environment. As consumer demand increased, so did the race to win their business. Some of the claims were based upon genuine improvements manufacturers had made in their products. Other less forthright businesses succumbed to the pressure to compete by making environmental claims about their products regardless of the claims' accuracy or value to consumers. Terms such as "recyclable," "biodegradable," and "ozone friendly" became household words. Recognizing the potential that green marketing had to improve the environment, several state attorneys general, environmental groups and industry representatives asked the federal government to intervene and address the green marketing dilemma on a national level. Using its authority to prevent deceptive acts or practices in or affecting commerce, the FTC attempted to correct the situation by issuing its Guides for Environmental Marketing Claims in July 1992. To many, the FTC had only addressed half of the problem. The strictly voluntary Guides did discuss deceptive advertisements, but did little to help improve the overall quality of the environment.

If consumers are to make purchasing decisions based upon what is best for the environment two things must occur. First, someone or some organization must assess the impacts which products have on the environment from "cradle to grave," that is, from the moment raw materials are extracted from the earth through the ultimate disposal of the

product. Next, there must be some practical, understandable means of passing the results of those studies on to the consumers. Clearly, such a program is beyond the scope of the FTC's authority to regulate deceptive advertisements. This limitation on the FTC's part has lead some environmental groups and legal scholars to advocate greater EPA involvement in regulating green marketing. After all, they argue, it is EPA and not the FTC which has the technical expertise to ensure that consumers receive better information about products on the market. Without this information, consumers will be unable to make purchasing decisions based upon a product's environmental attributes.

The purpose of this thesis is to explore the FTC's and EPA's traditional involvement in the environmental marketing dilemma. Because of the interdisciplinary nature of this problem, neither the FTC nor EPA is capable of resolving this issue entirely on its own in the absence of new legislation. Unlike other environmental challenges, a solution to this intractable problem demands greater consumer involvement. Therefore, the traditional command and control approach will probably not succeed. Alternative methods to solving the problem, can be found by looking outside the United States. For example, Germany, Canada and Japan, have used life cycle assessments and environmental certification programs to give their consumers more guidance in selecting environmentally preferable products. The success of those programs can be attributed, in large measure, to the high level of involvement by the German, Canadian and Japanese governments. Because of social and political differences, these environmental certification programs have limited applicability here in the United States. For example, considering the current political climate, it is highly unlikely that this Congress will enact the legislation necessary

to create a comparable program. Any environmental certification program in the United States must utilize the law as it currently exists, not as we would like for it to be. As the paradigm for regulating environmental marketing suggests, it is only through the combined efforts of the FTC and EPA in cooperation with industry, and environmental groups that can we begin to develop an effective certification program here in the United States. In the final analysis, the federal government can only make sure information is available. The ultimate decision on what to purchase will always remain with the consumers.

I. Overview of Green Marketing

To some observers the seeds of environmental advertising were planted on Earth Day 1970, when a group of scientists and environmentalists began to focus the world's attention on the earth's diminishing supply of soil, air and water.[1] For others, environmental advertising springs from the public's heightened awareness of global environmental problems, such as acid rain, climate change, and stratospheric ozone depletion brought to them via the nightly news.[2] On a national level, Americans began to understand the exhaustability of their own natural resources as a result of the Exxon Valdez oil spill and the odyssey of the Islip (NY) garbage barge whose cargo no one was willing to accept.[3] As a result, consumer interest in purchasing products that were less harmful to the environment increased significantly.[4] Specifically, consumers began to seek goods and packaging that used fewer natural resources, consumed less energy and caused less pollution during production.[5] Spurred by a growing desire to protect the environment,[6] consumers even expressed a willingness to pay more for products that would reduce environmental degradation,[7] or so they said. In reality, there was a large gap between what consumers said and their actual purchasing behavior. For example, a

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[1] Paul H. Luehr, Comment, *Guiding the Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising,* 10 UCLA J. ENVTL. L.& POL'Y 311, 312 (1992).

[2] Office of Pollution Prevention and Toxics, U.S. Environmental Protection Agency, Evaluation of Environmental Marketing Terms in the United States, EPA 741-R-92-003 (1993) 1, [hereinafter EPA Evaluation].

[3] *Id.*

[4] Attorneys General of California, Florida, Massachusetts, Minnesota, Missouri, New York, Texas, Utah, Washington, and Wisconsin, The Green Report: Findings and Recommendations for Responsible Environmental Advertising 12 (1990) [hereinafter Green Report I].

[5] Roger D. Wynne, *Defining "Green": Toward Regulation of Environmental Marketing Terms,* U. MICH. J .L. REV. 785, 786.(1991).

[6] Green Report I, *supra* note 4, at 4.

[7] EPA Evaluation, *supra* note 2, at 24.

Wall Street Journal/NBC News poll taken in 1991 found that seventy-five percent of those surveyed considered the environmental reputation of a product or manufacturer to be important, but only fifty-four percent actually chose the more expensive product for environmental reasons.[8]

As consumer demand for less harmful products increased, so did the race to win their business. Companies felt intense pressure to make environmental claims in order to satisfy the consumers and remain competitive.[9] In response to consumer demand, many companies made sincere efforts to minimize the environmental impacts of their products by using recycled materials, eliminating excess packaging, and developing products that were more durable.[10] Other less forthright businesses succumbed to the pressure by making environmental claims without regard to their value or use to consumers.[11] To be green or not to be green wasn't really the question; rather, it was how to remain competitive.[12] For sellers, the market was, and remains to be, their primary focus.

A. Consumer Confusion

In their zeal to maintain market share, manufacturers caused green marketing terms such as "environmentally friendly," "recyclable," and "biodegradable" to become household words.[13] While everyone who has studied environmental marketing agrees that the use of such terms has caused confusion among consumers, no consensus has been

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[8] John M. Church, *A Market Solution to Green Marketing: Some Lessons from the Economics of Information,* 79 MINN. L. REV. 245, 253-254 (1994).
[9] Green Report I, *supra* note 4, at 12-13.
[10] Wynne *supra* note 5, at 787.
[11] Green Report I, *supra* note 4, at 12-13.
[12] *Id.* For example, despite having previously acknowledged that degradation of plastic trash bags did not really benefit the environment, the Mobil Corporation began to make "degradable" claims about its trash bags because its chief competitor began to make such claims. *See* Stephen Gardner, *How Green Were My Values: Regulation of Environmental Marketing Claims,* 23 U. TOL. L. REV. 31, 38 (1991).
[13] Wynne *supra* note 5, at 786.

reached on how the problem should addressed. Is consumer confusion something negative which requires the intervention of regulators and government officials? Or, is it essential to a well functioning market? The answer to this question seems to depend upon whether one views the market through the eyes of an attorney/regulator or an economist. From a legal perspective, green marketing has two positive impacts on the environment: (1) it gives consumers the information they need to make environmentally sound decisions; and (2) it encourages manufacturers to produce more environmentally sound products.[14] Thus, green marketing only has value if consumers can distinguish between products which are truly environmentally preferable as opposed to those being marketed with misleading or exaggerated claims.[15] To those with a regulatory bent, any consumer uncertainty is unacceptable.[16] As a result, advocates of this point of view have sought increased regulation of environmental advertising and labeling, in the form of uniform definitions, to address consumer uncertainty.[17]

The contrary view advanced by commentators with an inclination toward economics is that consumer confusion has a legitimate role in the marketplace. They refer to the process by which consumers attempt to gather the information necessary to end their confusion as a "search."[18]

> To make purchasing decisions conform to their preferences, consumers will seek information concerning product attributes. Consumers may obtain such information by gathering information for themselves from inspection, observation, and experience; purchasing information from intermediaries

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[14] Glenn Israel, *Taming the Green Marketing Monster: National Standards for Environmental Marketing Claims,* 20 B. C. ENVTL. AFF. L. REV. 303, 304 (1993).
[15] *Id.*
[16] David F. Welsh, *Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green,"* 81 CAL. L. REV. 991, 993 (1993).
[17] Church, *supra* note 8, at 286.
[18] *Id.* at 272.

> such as journalists or other media sources; receiving information through advertising or third party certifications; from competing sellers; or by benefiting from information gathering activities of others through recommendations, reputation, and other market signals.[19]

Under this approach, consumers control the market through their capacity to either purchase or not purchase a product again.[20] Sellers, so the argument goes, who depend upon repeat purchases are less likely to engage in misleading advertising.[21] Economic-based approaches are often considered superior to command and control strategies because they rely on the market's demonstrated capability to reach efficient solutions.[22] On some level, market-based approaches respond to individuals' desires to make their own financial, economic and lifestyle choices.[23] Thus, the economists assert that, if left alone, the marketplace itself will take care of false and misleading advertisements.

B. Attorneys General Task Force

In November 1989, the Attorneys General of California, Massachusetts, Minnesota, Missouri, New York, Texas, Washington, and Wisconsin formed an *ad hoc* task force to assess the impact of the "green marketing craze" upon the American public.[24] Statistics show that these concerns were well founded. The number of products with environmental claims increased from 5.9 percent of all new product introductions in 1989 to 12.3 percent in 1991.[25] Although the Federal Trade Commission and the U.S. Environmental Protection Agency were aware of the growing number of misleading and

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[19] *Id.*
[20] *Id.* at 274.
[21] *Id.*
[22] John Rousakis and Bernard A. Weintraub, *Packaging, Environmentally Protective Municipal Solid Waste Management, and the Limits to the Economic Premise,* 14 ECOLOGY L. Q. 947, 978 (1994).
[23] *Id.*
[24] EPA Evaluation, *supra* note 2, at 5.
[25] *Id.* at 35.

deceptive environmental marketing claims, they were precluded from taking action by the Reagan administration's policy on deregulation.[26] In one commentator's opinion, the marketing community "took federal deregulation as a 'Get Out of Jail Free' card and as an uncategorical imperative to go forth and lie, cheat, and steal at the expense of consumers, who were left defenseless."[27] As a group, the Attorneys General realized the tremendous potential the "green revolution" had to improve the quality of the nation's environment.[28] They identified several problems that could occur if deceptive and misleading environmental claims remained unchecked. First, if consumers felt they were being exploited they might cease to demand products that were less damaging to the environment: any environmental improvements to be achieved through the purchase of environmentally benign products would therefore be lost.[29] Next, the Task Force feared that consumers would be lead to believe that certain environmental problems no longer existed.[30] Perhaps most importantly, the Attorneys General were concerned that confused consumers would believe they were purchasing "good" products without realizing that some environmental damage always occurs whenever an item is produced and consumed.[31]

On March 14 and 15, 1990, the Task Force held a national public forum on environmental marketing to determine: (1) whether the government needed to regulate environmental marketing; and (2) if so, what type of regulation would be most effective.[32]

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[26] Stephen Gardner, *How Green Were My Values: Regulation of Environmental Marketing Claims,* 23 U. TOL. L. REV. 31, 33 (1991).
[27] *Id.*
[28] Green Report I, *supra* note 4, at 8.
[29] *Id.* at 6.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 8-9.

The Attorneys General subsequently documented the results of the public forum in "The Green Report: Findings and Preliminary Recommendations for Responsible Environmental Advertising" (Green Report I).[33] The participants in the public forum agreed on a number of issues. Yet, when it came to the use of specific environmental terms, such as degradability, recyclability, and recycled content, views began to diverge.[34] Industry, in particular, wanted more leeway in the nature and extent of claims that would be allowed.[35]

C. Controversial Terms

1. Degradable. While they acknowledged that "degradable" plastics would not solve the nation's solid waste problems, certain manufacturers nevertheless argued that their products did indeed break down in a number of environments.[36] For example, American Enviro Products claimed that their "Bunnies" disposable diapers would biodegrade within 3-5 years as opposed to the 200-400 years required for their competitors' diapers."[37] The reason for the allegedly accelerated rate of degradation was

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[33] Green Report I, *supra* note 4.
[34] Gardner, *supra* note 26, at 53.
[35] *Id.* at 53.
[36] Green Report I, *supra* note 4, at 16.
[37] FTC Docket No. C-3376 (March 26, 1992). American Enviro Products, Inc., placed the following claim on Bunnies' packages:

- "Disposable diapers are one of the most serious environmental problems we have today, Every day in the U.S.A. over 50 million disposable diapers are thrown away. Their polymers plastic backing will last from 200-400 years in our landfills before they biodegrade.
- Bunnies are constructed with a revolutionary outer backing. This backing contains biodegrading agents which, when combined with the polymer matrix, dramatically accelerate the biodegradability process so they biodegrade within 3-5 years.
- Bunnies and the plastic bag they are sold in are both made of this new biodegradable material and both will degrade before your child grows up."

a "revolutionary outer backing" which contained biodegrading agents.[38] Since American Enviro Products, Inc., had no reliable scientific evidence to support its claims, the advertisements were found to be deceptive. In reality, modern landfills are designed to isolate waste from the environment, so little degradation actually occurs.[39] Even items that normally break down rather easily (such as food and paper) can last for decades.[40] To achieve degradability, manufacturers often use additives that allow light and microorganisms to sever the bonds within the material.[41] While the additives break down, the synthetic plastics do not.[42] Consequently, degradable plastics simply disintegrate into smaller pieces of plastic.[43] Environmentalists charge that promoting such products as "degradable" is deceptive. Consumers, they argue, are lulled into thinking they are helping to protect the environment when, in fact, they are not.[44]

2. Recyclable. There was also a lack of agreement as to whether it is appropriate to promote a product as "recyclable" when there is no readily available method of recycling the material in the area in which the product is sold.[45] Critics asserted that any product labeled "recyclable" must indeed be recyclable in each locality where the claim appears, unless the claim is very clearly limited.[46] EPA, on the other hand, defines a

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[38] *Id.* Finding the claims to be unsubstantiated, the FTC issued a consent order which required American Enviro Products, Inc., to "cease and desist" claiming that the diapers were "degradable," "biodegradable," or "photodegradable;" or that the plastic offered any environmental benefits when placed into an ordinary sanitary landfill or incinerated. The Attorneys General from several states had issued a consent orders against the company for making the same product and claim in October 1990.

[39] Green Report I, *supra* note 4, at 16.

[40] Church, *supra* note 8, at 283.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] Green Report I, *supra* note 4, at 17.

[45] *Id.*

[46] Gardner, *supra* note 26, at 56.

recyclable product as one that "can be recovered from or otherwise diverted from the solid waste stream for the purpose of recycling."[47] The most prevalent source of confusion associated with the term "recyclable" involves the availability of recycling "facilities." Many claims of recyclability only pertain to technical feasibility and do not disclose whether recycling facilities are available in the local geographic region.[48] As a result, consumers mistakenly place "recyclable" items into a solid waste stream which cannot accommodate them. Local governments must then incur additional costs identifying and removing the non-recyclable items once they reach community recycling centers.[49]

3. Recycled. Finally, there was a dispute as to the appropriate meaning of the term "recycled." For EPA's purposes, "recycled" means that a product or package is made of pre-consumer or post-consumer materials.[50] Yet, testimony presented at the public forum indicated that consumers understand the term to refer to post-consumer waste only.[51] Environmentalists argue that consumers are confused and possibly mislead when manufacturers who reuse only a small percentage of their own millsite market the resulting product as containing recycled material.[52] In their fervor, environmentalists may have taken a position which cannot be supported by those who are actually in the recycling business. For example, the recyclers themselves cannot always readily distinguish between pre-consumer and post-consumer waste.[53] In fact, they recycle a

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[47] Church, *supra* note 8, at 279.
[48] *Id.*
[49] Green Report I, *supra* note 4, at 18.
[50] Church *supra* note 8, at 280.
[51] Green Report I, *supra* note 4, at 18.
[52] Gardner, *supra* note 26, at 55.
[53] Luehr, *supra* note 1, at 319.

newspaper bought by a subscriber (post-consumer waste) in the same manner as copy left on the printroom floor (pre-consumer waste).[54]

4. General Environmental Claims. To a much smaller degree, general environmental claims have also been a source of confusion to consumers. Marketing terms or slogans, such as "environmentally safe," environmentally friendly," and "safe for the environment," are vague and virtually devoid of content.[55] Nevertheless, marketers increased their use of those terms more than five-fold from 1989-1990.[56] For example, First Brands Corp., claimed that its Glad trash bags were "Safe for the Environment."[57] In fact, the company could not substantiate any of the claims being made about the environmental attributes of its trash bags.[58] Any assertion that a product is "good for the environment" is particularly troublesome because it does not reflect either the raw material depletion or the harmful effects that even the most benign consumer goods generate.[59]

5. Ozone-Related Claims. Although ozone-related claims compromised less than one percent of the environmental claims made between 1989 and 1991,[60] they have also

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[54] *Id.*

[55] EPA Evaluation, *supra* note 2, at 13. *See* Church, *supra* note 8, at 285.

[56] Church, *supra* note 8, at 285.

[57] FTC Docket No. C-3358 (January 3, 1992). First Brands Corp., placed the terms "Improved," "Degradable," and "Safe for the Environment" on the front panel of each package of "Glad" trash bags. On the bottom panel First Brands placed the following claims:

- GLAD Bags are well suited for their role in the environment. . . And now GLAD Bags are more photodegradable than ever, thanks to a new additive that promotes degradation without sacrificing strength.
- GLAD Bags are photodegradable thanks to an additive that promotes degradation without sacrificing strength.
- Are degradable in the sunlight.
- Act as a non-contaminating inert material in a landfill.

[58] *Id.* Since the company could not substantiate its claims, the FTC issued a consent order against First Brands, Inc., requiring it to cease and desist representing that "Glad" trash bags offered a significant environmental benefit when consumers disposed of them as trash.

[59] Luehr, *supra* note 1, at 320.

[60] EPA Evaluation, *supra* note 2, at 46.

caused confusion among consumers.[61] According to one commentator, nearly seventy percent of consumers responding to a 1990-1991 survey did not understand the phrase "No CFCs."[62] For example, Jerome Russell Cosmetics USA, Inc., made the following claim about its "Halloween" hair sprays: "No Fluorocarbons Ozone Safe".[63] In fact, the products contained Class I ozone depleting substances. The claims were therefore deceptive. Since there has been a ban on CFCs since 1978, any product labeled "CFC-free" or "ozone friendly" really means that the manufacturer has complied with the law, not that he has improved the quality of his product for environmental reasons.[64]

In spite of the differences of opinion on how specific marketing terms should be used, the Task Force nevertheless identified several issues on which the participants in the public forum agreed. By far the most important area of consensus was the virtually unanimous call for the development of uniform national guidelines or standards for environmental marketing claims.[65]

D. Recommendations of the Task Force

The call for national guidelines lead the Task Force to develop a series of recommendations on how environmental marketing claims should be addressed. These

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[61] Church, *supra* note 8, at 284.

[62] *Id.*

[63] Jerome Russell Cosmetics USA Inc., FTC Docket No. C-3341 (August 30, 1991). On the labels of its Fluorescent Ultra Hair Glo, Hair and Body Glitter Spray, Hair Color and Fluorescent Color or Glitter claimed that its products were:

- Ozone Friendly, Ozone-Safe - Contains No Fluorocarbons
- No Fluorocarbons Ozone Safe

Finding that claims to be unsubstantiated, the FTC issued an order requiring the corporation to cease representing that any product containing Class I ozone depleting substances were "ozone safe," or "ozone friendly" or that they would not deplete, destroy or otherwise adversely affect ozone in the upper atmosphere. For another example of ozone related claims see Zipatone Inc., FTC Docket No. C-3336 (July 29, 1991).

[64] Church, *supra* note 8, at 284.

[65] Green Report I, *supra* note 4, at 19.

recommendations were based in part upon the shared belief among the economists and regulators that consumers need accurate information about the environmental qualities of the products they are purchasing. Believing that consumers are vulnerable individuals who need the government to look out for their interests, the regulators assert that the government should intervene to control the manner in which environmental advertisements are made. The economists, on the other hand, argue that in a properly functioning market consumers will decide which products to buy on the basis of information searches which they themselves conduct. Moreover, since consumers control the market through their ability to purchase the same product repeatedly, marketers will be compelled to provide consumers with accurate information in order to protect their share of the market.

There is a third possibility which neither side has addressed. That possibility is related to the consumer's current state of mind. Most Americans are so overloaded with the information the receive daily that they can no longer absorb even an iota more. Consider, if you will, how many times during the course of an evening of watching television the American consumer is bombarded with commercials touting the virtues of everything from paper towels to toilet bowl cleaner. As a defense mechanism, many people simply "tune out" the information they receive via the air waves about the products in their local supermarkets. Those consumers who do not immediately reject the aural advertisements probably cannot afford to spend extra time at the supermarket reading the side panels of boxes of trash bags to determine which product is preferable environmentally. Thus, not all of the confusion which consumers experience in the

marketplace can or should be attributed solely to environmental marketing claims. Arguably, there are other reasons for the confusion.

One of those additional reasons could easily be the array of products from which consumers must choose in the first place. For example, the shelves of most local supermarkets are filled with a variety of different powder, liquid, and concentrated laundry detergents. When pressed for time and faced with the countless packages on the shelves the average consumer, in all likelihood, will simply ignore the intangible "environmental attribute" claims and make a decision on price (or some other easily recognizable quality) alone. Consequently, one has to question how much of a "search" consumers really conduct before deciding which environmentally benign products to purchase, assuming they have any interest in buying such products at all. There is simply no way to gauge the extent to which consumers are influenced by environmental marketing claims. If consumers truly wish to protect the nation's environment through their purchasing decisions, then they need more than nondeceptive advertisements. They need: (1) to learn how to look beyond superficial marketing claims; and (2) to become aware of the importance of upstream causes of environmental damage.[66] Better informed consumers will give producers constructive marketplace feedback and incentives to make real environmental improvements.[67] Ensuring that marketers make more accurate claims about their products is a step in the right direction, but it is not the entire answer to this difficult and complex problem.

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[66] EPA Evaluation, *supra* note 2, at 21.
[67] EPA Evaluation, *supra* note 2, at 25.

In order to reduce confusion and the potential for consumer exploitation, the Task Force offered two categories of recommendations. The first category focused on the need for federal action. Specifically, the Task Force recommended that the federal government, after consulting with the states, adopt a national regulatory scheme establishing definitions for environmental marketing claims to be used in the labeling, packaging and promotion of products on the basis of environmental attributes.[68] According to the Task Force, uniform definitions for terms such as "recycled," "recyclable," and "compostable," would serve two purposes: (1) businesses would know what they must do to change their products in order to make specific environmental claims; and (2) consumers would be armed with the information they need to make purchasing decisions based on environmental considerations.[69]

While there was almost unanimous support for standards to be adopted on a national level, the participants in the Public Forum had different opinions as to who should draft those standards. Several organizations advocated industry sponsored guidelines.[70] Others suggested that the guidelines be promulgated by a third party such as the Better Business Bureau or the American Association of Advertising Agencies.[71] In spite of these suggestions the Task Force nevertheless favored a federal regulatory response. Unlike other types of marketing claims, environmental advertising could affect the environment.[72]

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[68] *Id.* at 20.
[69] *Id.*
[70] *Id.* at 23.
[71] *Id.* The National Advertising Division of the Better Business Bureau expanded its review of environmental labeling claims is 1991. It promoted industry self-regulation by reviewing potentially misleading advertisements and then working with marketers to promote truth-in-advertising. The Division was able to convince some companies to voluntarily change or drop their labeling. See EPA Evaluation, *supra* note 4, at 94.
[72] *Id.* at 23.

Therefore, reasoned the Task Force members, the federal government needed to be a key participant in the standard setting process to ensure consistency with other regulatory goals or initiatives.[73]

The second category of preliminary recommendations which the Task Force made was intended to provide the business community interim guidance until the federal government could respond more fully.[74] After affording industry, environmental groups, and consumers an opportunity to respond, the Task Force subsequently revised its recommendations in "The Green Report II: Recommendations for Responsible Environmental Advertising" (Green Report II).[75] In sum, the Task Force recommended that:

1) Environmental claims should be as specific as possible, not general, vague, incomplete, or overly broad.[76]

2) Environmental claims relating to the disposability or potential for recovery of a particular product (e.g., "compostable" or "recyclable") should be made in a manner that clearly discloses the general availability of the advertised option where the product is sold[77]

3) Environmental claims should be substantive.[78]

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[73] *Id.* at 23-24.

[74] Green Report I, *supra* note 4, at 3. There were four preliminary recommendations which the business community could follow. They were:

1. Environmental claims should be as specific as possible, not general, vague, incomplete, or overly broad.

2. Environmental claims relating to disposability (e.g., "degradable" or "recyclable") should not be made unless the advertised disposal option is currently available to consumers in the area in which the product is sold and the product complies with the requirements of the relevant waste disposal programs.

3. Environmental claims should be substantive.

4. Environmental claims should, of course, be supported by competent and reliable scientific evidence.

[75] Attorneys General of California, Florida, Massachusetts, Minnesota, Missouri, New York, Tennessee, Texas, Utah, Washington, and Wisconsin, The Green Report II: Recommendations for Responsible Environmental Advertising (1991), [hereinafter Green Report II].

[76] *Id.* at vii.

[77] *Id.*

4) Environmental claims should, of course, be supported by competent and reliable scientific evidence.[79]

These recommendations became the basis for the FTC's subsequent efforts to regulate deceptive environmental marketing claims.

[78] *Id.*

[79] Green Report II, *supra* note 4, at vii.

II. Regulation of Trade Practices

Even before the Attorneys General Task Force became involved, federal regulation of environmental marketing claims fell within the jurisdiction of the Federal Trade Commission, exclusively. Under section 5 of the Federal Trade Commission Act,[80] (FTC Act) the Commission is "empowered and directed to prevent persons, partnerships, and corporations. . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[81] The process of preventing unfair or deceptive acts or practices begins when the Commission initiates an enforcement action by serving a complaint and notice of hearing upon the alleged violator.[82] If, after presentation of the respondent's case at the hearing, it is still of the opinion that a deceptive or unfair act has been committed, the Commission will issue a cease and desist order.[83]

The person, partnership, or corporation which receives a cease and desist order may either petition the Commission to set the order aside, or seek further review in a United States court of appeals.[84] Respondents who are dissatisfied with the decision issued by the court of appeals may file a petition for certiorari with the United States Supreme Court.[85] Violations of final cease and desist orders[86] can result in the imposition

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[80] Pub. L. No. 63-203, § 5, 38 Stat. 717, 719 (1914), codified as amended at 15 U.S.C. § 45(a)(1).

[81] 15 U.S.C. § 45(a)(2). Specifically excluded from the terms persons, partnerships, or corporations are banks, savings and loan institutions described in section 18(f)(3), Federal credit unions described in section 18(f)(4), common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act.

[82] 15 U.S.C. § 45(b). The alleged violator has the right to appear at a hearing and present evidence as to why the advertisement does not violate section 5 of the FTC Act. Upon a showing of good cause, the Commission may permit other parties to intervene in the proceedings.

[83] *Id.*

[84] 15 U.S.C § 45(c).

[85] *Id.*

of civil penalties of up to $10,000 per day per violation.[87] Finally, the FTC Act gives the Commission authority to recover any unpaid civil penalties in United States district court.[88] Under the statute, the Commission cannot declare an act or practice to be unfair unless it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves."[89] All determinations concerning unfair trade practices are made on a case-by-case basis.

In analyzing cases under section 5 of the Act, the FTC asks three basic questions: (1) is the ad unfair; (2) are the claims which the advertiser is making adequately substantiated; and (3) does the advertisement deceive the public? Insight into how the Commission uses these questions to evaluate advertisements will be discussed in the succeeding sections.

A. **Unfairness**. The Commission has employed a three part test when evaluating unfair commercial acts or practices for unfairness. The factors are: (1) whether the practice injures consumers; (2) whether it violates established public practice; and (3) whether it is unethical or unscrupulous.[90] From a legal perspective, in order to be declared

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[86] Generally, the Commission's order becomes final if: (1) a petition for review is not timely filed; (2) the Commission does not take any action on its own to either modify the order or to set it aside; or (3) the order has not been stayed by either a court of appeals or the Supreme Court. See 15. U.S.C. § 45(g).

[87] 15 U.S.C. § 45(l).

[88] 15 U.S.C. § 45(m)(1)(A).

[89] 15 U.S.C. § 45(n). The Commission cannot declare an act or practice to be unfair if the injury is outweighed by the benefits to the consumers or competition. In making its determination, the Commission is permitted to consider established public policy as evidence. However, the Commission cannot base its entire decision solely on the public policy.

[90] Federal Trade Commission Unfairness Policy Statement, appended to International Harvester Co., 104 FTC 949, 1070 (1984). The Policy Statement was issued in response to a letter from Senators Wendell H. Ford and John C. Danforth concerning the upcoming oversight hearings on the concept of "unfairness" as it had been applied to consumer transactions. The Senators were the Chairman and Ranking Minority Member, respectively, of the Commission Subcommittee, Committee on Commerce, Science, and Transportation.

unfair under section 5 of the Act, the act or practice must substantially harm (or injure) the consumer. In other words, the action must impact the consumer financially or present unwarranted health and safety risks.[91] Finally, the "injury must be one which consumers could not reasonably have avoided."[92] In applying the second element of the "unfairness" standard, the Commission asks whether the advertiser's conduct violates a previously established public policy.[93] The Commission will only be influenced by public policies which are clear, well-established and widely shared.[94] The third "unfairness" inquiry, whether the conduct was immoral, unethical, oppressive or unscrupulous, allows the Commission to reach conduct that violates generally recognized standards of business ethics.[95] Since conduct which is immoral, unethical or oppressive usually either injures consumers or violates public policy, the Commission rarely needs to apply this portion of the test.[96]

B. **Substantiation**. The doctrine of prior substantiation requires advertisers and ad agencies to have a reasonable basis for making particular claims before those claims are

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[91] *Id* at 1073.. The benefits which the consumer derives from such advertisements must outweigh any corresponding harm. For, example, suppose the Commission required a manufacturer to place more technical information in it advertisement In turn, the manufacturer raised the price of the product. The harm to the consumer from the increased cost of the product might outweigh any benefit to be gained from technical information.

[92] *Id.* at 1074. Under normal circumstances, consumers make decisions about what to purchase without any regulatory intervention. However, marketers sometimes engage in practices which hinder the consumer's ability to make her own decisions. When this occurs, it may become necessary for the Commission to take corrective action.

[93] *Id.* at 1074. The public policy may have been established by statute, common law, industry practice or otherwise. The Commission most frequently uses this public policy as evidence of the extent harm which the specific practice caused the public. On occasion, public policy forces the Commission to accept a practice it would otherwise declare to be unfair.

[94] *Id.* at 1076.

[95] *Id.*

[96] *Id.*

presented to the public.[97] The doctrine applies to express and implied claims which make objective assertions about the item or service being advertised.[98] If a firm implies that a product has a certain level of support, it must have both the amount and type of substantiation to support the implication communicated to consumers.[99] The Commission has traditionally obtained substantiation by: (1) making demands upon firms within a targeted industry or firms in different industries making the same type of claim; or (2) sending specific requests to individual companies under investigation.[100] Although the Commission is primarily concerned that the firm possess the required substantiation before the advertisement is disseminated to the public, post claim substantiation will be considered in limited circumstances.[101]

C. **Deception**. According to the FTC, all deception cases contain several common elements.[102] First, there must be a representation, omission or practice that is likely to mislead consumers.[103] Next, the Commission examines the challenged practice

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[97] Federal Trade Commission Statement Regarding Advertising Substantiation, appended to Thompson Medical Co., 104 FTC 648, 839 (1984). The policy statement was issued in response to a notice the Commission published in the Federal Register on Mar. 11, 1983 requesting comments on its advertising substantiation program.

[98] *Id.* Examples of express claims are "tests prove", "doctors recommend" and "studies show."

[99] *Id.* at 840. In the absence of an express or implied levels of support, the Commission assumes that consumers will expect the firm to have a "reasonable basis" for making the claims.

[100] *Id.*

[101] *Id.* at 841. Those circumstances are:

(1). When deciding, before issuance of a complaint, whether there is a public interest in proceeding against a firm.

(2). When assessing the adequacy of the substantiation an advertiser possessed before a claim was made; and

(3). When deciding the need for or appropriate scope of an order to enter against a firm that lacked a reasonable basis prior to disseminating an advertisement.

[102] Federal Trade Commission Policy Statement on Deception, appended to Cliffdale Associates, Inc., 103 FTC 110, 174-175 (1984). The policy statement was issued in response to an October 14, 1983 letter from Congressman John D. Dingell concerning the Commission's enforcement policy against deceptive acts or practices. Congressman Dingell was Chairman of the House Committee on Energy and Commerce.

[103] *Id.* at 175.

from the perspective of the reasonable consumer. Finally, the representation, omission or practice must be "material," that is, one which is likely to affect the reasonable consumer's conduct or decision-making regarding a product or service.[104] Essentially, this is a "but for" test. In all likelihood, the consumer would have reached a different decision if the manufacturer had not engaged in the deceptive act or unfair practice.

1. The Representation, Omission or Practice. Here, the Commission focuses on whether the firm's action is likely to mislead the consumer, rather than on whether deception actually occurs. Not surprisingly, the Commission's first step is to determine if a representation, omission, or practice has in fact taken place, either expressly or by implication.[105] From the Commission's perspective, express claims are easier to evaluate since the meaning is established in the representation itself.[106] On the other hand, implied representations require the Commission to examine: (1) the entire document; (2) the juxtaposition of various phrases within the document; (3) the nature of the claim; and (4) the nature of the transaction.[107] On occasion, the Commission uses extrinsic evidence, such as expert opinion, to determine what the reasonable consumer believes the claim is communicating.[108]

2. The Reasonable Consumer. In all cases, the representation, omission, or practice is not deceptive unless it is likely to mislead the consumer acting reasonably under the circumstances.[109] The concept of the "reasonably prudent purchaser" or the "ordinary

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[104] *Id.*
[105] *Id* at 176.
[106] *Id.* at 176.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 177.

consumer using ordinary care" (consumer acting reasonably under the circumstances) has long been the standard against which the Commission and the courts have measured the likelihood for consumer confusion.[110] As of yet, no universal traits have been used to describe this hypothetical consumer.[111] For example, according to one court, when evaluating a claim for deception, the Commission should read the language from the perspective of the least sophisticated rather than the most sophisticated viewer.[112] According to another court, the general public (reasonable consumer) includes the ignorant, the unthinking, and the incredulous who are governed by appearances and general impressions when making purchases.[113] Hopefully, contemporary consumers are not as easily influenced by what they see and hear.

The Commission presumes that the consumer's interpretation is reasonable if it is the one which the seller intended to convey.[114] When examining cases in which the seller has failed to disclose necessary information (omissions cases), the Commission will use the typical buyers' expectations and understandings of the claims made.[115] Similarly, when the

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[110] RESTATEMENT (THIRD) LAW OF UNFAIR COMPETITION § 20 cmt. h (1995); *See e.g.,*, McLean v. Fleming, 96 U.S. 245, 24 L. Ed. 828 (1878); Plus Products v. Plus Discount Foods, Inc., 722 F.2d 999 (2d Cir. 1983).

[111] *Id.*

[112] Exposition Press v. Federal Trade Commission, 295 F.2d. 869 (2d Cir. 1961). The petitioner, a book publisher, had made the following advertisement in newspapers and magazines:

> "Free to Writers"
> seeking a book publisher
> Two fact-filled, illustrated brochures tell how to publish your book, get 40% royalties, national advertising, publicity and promotion."

The advertisements failed to tell consumers that "royalties" did not constitute a net return to the author, but that the cost of printing, promoting, selling and distributing the book must be paid in whole or in substantial part by the author.

[113] Niresk Industries Inc., v. F.T.C., 278 F.2d. 337 (7th Cir. 1960).

[114] *Id.* at 177-178. Depending upon the circumstances, a practice may elicit different responses from different consumers, both of which the Commission may consider to be reasonable. For example, if a seller's representation conveys both a true and a false meaning to consumers, the seller will still be held liable for the misleading representation.

[115] *Id.* at 179.

sales practices are targeted at a specific audience, such as children, the Commission determines what effect the representation or practice would have upon a reasonable member of the targeted group.[116] No matter how much it may dissect a particular claim during an investigation, the Commission will ultimately base its decision on the advertisement as a whole.[117]

3. Materiality. The third element of a deception case is materiality. A "material" misrepresentation, omission or practice is one which is likely to affect a consumer's decision regarding a product.[118] According to its Policy Statement on Deception,[119] there are certain categories of information which the Commission presumes to be material. First, all express claims are presumed to be material. In addition, the Commission will presume materiality where the seller knew, or should have known, that an ordinary consumer would need the omitted information to properly evaluate the product or service as well as the falsity of the claim.[120] Materiality will be presumed under such circumstances because the seller intended the omission to influence the consumer's decision. Finally, the Commission presumes that information pertaining to a product's purpose, safety, efficacy, cost or service is also material.[121] In essence, a finding of materiality is a finding that injury is likely to exist because of the representation, omission, sales practice or marketing technique. The Commission therefore considers injury and materiality to be different names for the same concept.[122]

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[116] *Id.*
[117] *Id.* at 181.
[118] *Id.* at 182.
[119] Federal Trade Commission Policy Statement on Deception, *supra* note 103.
[120] *Id.* at 182.
[121] *Id.* The Commission has expanded the concept of materiality to include durability, performance, warranties or quality.
[122] *Id.*

The strong language of section 5 of the FTC Act gives one the impression that the Commission's authority to regulate deceptive practices and unfair acts is almost limitless. This is not so. The FTC, like other federal agencies, has seen its power ebb and flow depending upon the political climate in which it is operating. For example, during the Reagan administration the FTC's authority was seriously eroded.[123] Under the leadership of former Commissioner James Miller, who vigorously implemented the President's deregulation policy, FTC enforcement activities almost slowed to a standstill.[124]

The FTC's traditional case-by-case approach to deceptive advertising has been viewed by many to as being inadequate to meet the challenges presented by the environmental advertising phenomenon. During the 1992 Hearings on Environmental Marketing Issues, state officials and industry representatives were given an opportunity to present their concerns directly to the FTC.[125] Stressing the need for a quick response, the National Association of Attorneys General (NAAG) charged that the current case-by-case approach was too slow to allow swift reaction to newly emerging strategies, such as green marketing.[126] Accordingly, the NAAG encouraged the FTC to adopt national green marketing guidelines.[127] During the same Hearings, manufacturers were equally critical of the FTC's case-by-case approach. Their criticism had a slightly different basis, however. From the manufacturers' perspective, the FTC's case-by-case approach was causing the states to enforce their own little FTC acts more aggressively.[128] With multistate

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[123] Gardner, *supra* note 26, at 33.
[124] *Id.*
[125] Israel, *supra* note 14, at 318.
[126] *Id.*
[127] *Id.*
[128] *Id.*

enforcement actions of the same environmental marketing terms being pursued simultaneously, manufacturers were not certain of how to comply with the law.[129]

While some manufacturers have experienced uncertainty about environmental advertising on the state level, others have had a similar experience on the federal level. For example, in his article "Guiding the Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising,"[130] author Paul Luehr offers the following scenario:

> An attorney recently called the FTC's Los Angeles Regional Office to discuss a client's plans to build a water bottling plant. The client wanted to label his mountain spring water with the phrase "bottled at the source"; however, because the spring sat amidst rocky terrain, the client did not know how close to the spring his plant could be located. When staff attorneys were questioned regarding FTC precedent on the phrase "bottled at the source," the attorneys could only reference decisions regarding purity of bottled water. No decisions were available to define the required geographic location.[131]

Although Luehr used this example to point out the need for precise definitions of environmental marketing terms, I believe it reveals another weakness with the case-by-case approach. It appears the FTC may be unable to tell a well intentioned manufacturer the about the possible consequences of his actions unless and until a particular phrase has actually been used in a particular context in the market place. In the face of this "we'll know it when we see it approach" manufacturers may either use a marketing term at their own risk or forego a possibly effective, valid, advertising tool.

Commentators have offered several more reasons why FTC adjudication still cannot be relied upon to resolve consumer confusion about environmental marketing

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[129] *Id.*
[130] Luehr, *supra* note 1.
[131] *Id.* at 316.

claims.[132] One reason is that case-by-case adjudication is time consuming, especially when developing technical definitions.[133] Perhaps the most convincing argument against relying on FTC adjudication is that the FTC does not have the technical expertise necessary to define the complex environmental terms used in green marketing claims.[134] This lack of precision in the current approach may not entirely be the Commission's fault. Some of the blame could legitimately be placed upon the statute under which the FTC must operate. Because no concrete definition of "deceptive practices" was included in the Federal Trade Commission Act, the Commission has no other choice but to develop the substance of the standards through case-by-case adjudication.[135] Consequently, the FTC's approach is selective, incremental and highly contextual.[136] From the consumer's point of view, the FTC Act is subject to even more criticism because the consumer must rely entirely on the Commission for enforcement action. Unlike other statutes, the FTC Act does not give citizens a right to bring actions against advertisers. Nor do consumers have a right to compel the FTC to pursue an enforcement action.[137] Since the FTC is wary of taking actions that it considers to be in the realm of environmental policy,[138] and beyond its mandate to prevent consumer deception,[139] the consumer must sit and wait until either a state attorney general or the FTC takes up the gauntlet. In spite of the limitations

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[132] Welsh, *supra* note 16, at 1007.
[133] *Id.*
[134] *Id.* at 1009.
[135] *Id.* at 1006.
[136] Jamie Grodsky, *Certified Green: The Law and Future of Environmental Labeling,* 10 YALE J. ON REG. 147, 155 (1993).
[137] *Id.* at 160.
[138] *Id.*
[139] *Id.*

presented by the FTC Act, the Commission nevertheless stepped forward to address the issues raised in Green Reports I and II.

III. The FTC Guides

On August 13, 1992, the Federal Trade Commission responded to the universal cry for federal action by issuing a set of Guides for the Use of Environmental Marketing (Guides).[140] The Guides specifically addressed the application of section 5 of the FTC Act to environmental advertising and marketing.[141] At first glance it appeared that the Guides would indeed be the answer to the states', consumers', and industry's prayers. In scope, the Guides apply to all forms of environmental claims including labeling, advertising and all other forms of marketing, whether express or implied. They apply to any claim about the environmental attributes of a product or package regardless of whether the item is intended for home, commercial or institutional use.[142] In reality, the Guides are narrower in scope than they initially appear to be. First of all, compliance with the Guides by members of industry is strictly voluntary.[143] Next, as the Commission is quick to point out, the Guides are not legislative rules under the FTC Act, are not enforceable as regulations, and do not have the force and effect of law.[144] Moreover, the Guides do not preempt federal, state, or local regulations governing the use of environmental marketing claims.[145]

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[140] 16 C.F.R. § 260.

[141] 16 C.F.R. § 260.1.

[142] 16 C.F.R. § 260 reads in part as follows: "These guides apply to environmental claims included in labeling, advertising, promotional materials and all other forms of marketing, whether asserted directly or by implication, through words, symbols, emblems, logos, depictions, product brand names, or through any other means. The guides apply to any claim about the environmental attributes of a product or package in connection with the sales, offering for sale, or marketing of such product or package for personal, family or household use, or for commercial, institutional or industrial use."

[143] 16 C.F.R. § 260.1.

[144] 16 C.F.R. § 260.2.

[145] *Id.*

Structurally, the Guides can be divided into two sections. The first section consists of general principles, which apply to all environmental claims. The second section is intended to give sellers detailed information on how to use specific terms, such as recyclable and ozone friendly.[146] To make the Guides more user friendly, the FTC provides examples of what it considers to be acceptable and unacceptable environmental marketing claims.[147] The examples in both sections are intended to provide a "safe harbor" for marketers seeking certainty about how to make a claim.[148] The four general principles which the Commission has chosen to discuss are: (1) qualifications and disclosures; (2) distinction between of product and package; (3) overstatement of environmental attributes; and (4) comparative claims. The principles address both the physical layout as well as the substance of the claims.

A. General Principles

1. Qualifications and Disclosures. In the Guides' first general principle the Commission sets forth its traditional views concerning qualifications and disclosures. According to the Guides, qualifications and disclosures should be sufficiently clear and prominent to avoid deception.[149] As such, they should be clearly stated, relatively close to and in the same size type as the claim being qualified.[150] Moreover, to ensure that their qualifications and disclosures are effective, sellers should avoid using contrary claims within the same advertisement.[151]

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[146] 16 C.F.R. § 260.3.
[147] *Id.*
[148] *Id.* In addition, some of the illustrative disclosures may be appropriate for use on labels, but not in print or broadcast advertisements and vice versa.
[149] 16 C.F.R. § 260.6(a).
[150] *Id.*
[151] *Id.*

2. Distinction Between Benefits of Product and Package. In the second general principle of the Guides, the FTC advises/encourages sellers to distinguish between benefits associated with a product and those which are associated with the product's packaging.[152] Here, the Commission wants to ensure that consumers clearly understand when the seller is talking about the product itself or the packaging. The qualification requirement does not apply to minor or incidental components.[153]

3. Overstatement of Environmental Attribute. In the Guides' third general principle the FTC discourages sellers from overstating the environmental attributes or benefits of their products, either expressly or by implication.[154] This includes implying that an environmental benefit is significant when, in fact, it is modest.[155]

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[152] 16 C.F.R. § 260.6(b).

[153] *Id.* The Commission offered the following examples to demonstrate its point.

> Example 1: A box of aluminum foil is labeled with the claim "recyclable." It must be clear from the product itself, the surrounding language or the context of the phrase whether the claim refers to the foil or the box. Otherwise, the claim is deceptive.
>
> Example 2. A soft drink bottle which is made entirely from recycled materials is labeled "recycled." The bottle cap is not made of recycled material. Since reasonable consumers are likely to consider the cap to be an incidental part of the bottle, the claim is not deceptive. It would also not be deceptive to label a shopping bag made completely of recycled material as "recycled" even if the handle is not. The handle is only a component part.

[154] 16 C.F.R. § 260.6(c).

[155] *Id.* The Guides contain the following examples of environmental benefit claims:

> Example 1: A package is labeled, "50% more recycled content than before." The manufacturer only increased the recycled content of the package from 2% to 3%. The claim is technically true, but it gives consumers a false impression.
>
> Example 2: A trash bag is labeled "recyclable" without qualification. Ordinarily, trash bags are not separated from other trash at the landfill or at the incinerator. The claim is deceptive since it asserts an environmental benefit where one does not exist.
>
> Example 3. A paper grocery sack is labeled "reusable." Reasonable consumers understand that the sack can only be reused two or three more times before falling apart. The claim is not deceptive, even without further qualification.

4. General Environmental Benefit Claims. General or "broad" environmental claims present two problems: (1) they are difficult for consumers to interpret; and (2) they convey a variety of meanings to consumers, depending upon the context in which they are presented. Therefore, in the Guides' fourth general principle, the FTC discourages sellers from making broad claims about their products unless they possess adequate substantiation.[156]

B. Use of Specific Terms

In Section Two of the Guides the FTC begins to address the commonly used environmental marketing terms which were discussed during the Attorneys General public forum

1. Degradable/Biodegradable/Photodegradable. In the Guides, the FTC takes a firm stand on the issue of degradability. Simply stated, it is deceptive to misrepresent, directly or by implication, that a product or package is degradable, biodegradable or photodegradable.[157] Although the Commission seems to be concerned about how the

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[156] 16 C.F.R. .§ 260.6(d). The Guides contain the following examples:

> Example 1: Naming a product "Eco-Safe" would be deceptive if it leads consumers to believe the product has environmental benefits which the manufacturer cannot substantiate.
>
> Example 2: A product wrapper is printed with the claim "Environmentally Friendly." Comments in the text explain that the wrapper was not chlorine bleached, but do not reveal that production of the wrapper creates and releases significant quantities of other harmful substances. The claim is deceptive.
>
> Example 3: A pump spray product is labeled "environmentally safe." The product's active ingredients consist of volatile organic compounds that contribute to ground level ozone formation. The claim is deceptive absent further qualification.

[157] 16 C.F.R. § 260.7(b). An unqualified claim that a product or package is degradable, biodegradable or photodegradable should be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature, i.e., decompose into elements found in nature within a reasonably short period of time after customary disposal. Claims of degradability should be qualified to the extent necessary to avoid consumer deception about:

term is used, the examples focus more on the manner in which the product is to be disposed.[158]

2. Compostable. The FTC's approach to the use of the term "compostable" is equally straightforward. Generally, it is acceptable to label a product "compostable" when: (1) composting facilities are available; (2) the environmental benefit provided when the product is placed into a conventional landfill is adequately explained; and (3) consumers understand when a product can be composted at home.[159]

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(1) The product or package's ability to degrade in the environment where it is customarily disposed ; and

(2) The rate and extent of degradation.

[158] *Id.* To illustrate the point the Commission gave the following examples:

Example 1: A trash bag is marketed with an unqualified claim of "degradable." The marketer relies on soil burial tests to show that the product will decompose in the presence of soil and oxygen. Yet, the plates are customarily incinerated or placed in sanitary landfills where little degradation via moisture and oxygen can take place. In reality, degradation is irrelevant for trash bags which are incinerated or placed into a landfill. The claim is therefore deceptive.

Example 2: A commercial agriculture plastic mulch film is advertised as "Photodegradable" and qualified with the phrase, "Will break down into small pieces if left uncovered in sunlight." The company has reliable scientific evidence to substantiate the claim being made. The qualified claim is not deceptive.

Example 3: A soap or shampoo product is advertised with an unqualified claim of "biodegradable" The ad does not make any other disclosures. The manufacturer has competent and reliable scientific evidence to show that the shampoo would decompose into elements found in nature when disposed of in a customary manner. The claim is not deceptive.

[159] 16 C.F.R. § 260.7(c). The Guide concerning claims of compostability provides the following examples:

Example 1: A manufacturer indicates that its unbleached coffee filter is compostable. The unqualified claim is not deceptive provided the manufacturer can substantiate that the filter can be converted safely to usable compost at a home compost pile or in an appropriate composting program or facility.

Example 2. A lawn and leaf bag is labeled as "Compostable in California Municipal Yard Waste Composting Facilities." The bag contains toxic ingredients that are released into the compost material as the bag breaks down. The claim is deceptive if the toxic ingredients prevent the compost pile from being usable.

Example 3. A manufacturer indicates that its paper plate is suitable for home composting. Since the claim focuses on home composting, the claim is not deceptive even if no municipal composting facilities exist.

3. Recyclable. According to the FTC, unless a product or package can be collected, separated, or otherwise recovered from the solid waste stream for use either as a raw material or to assemble or manufacture a new product, it is deceptive to claim that the item is recyclable.[160] If the product or package is made of both recyclable and non-recyclable components, the manufacturer must indicate which portions or components of the product or package are recyclable.[161]

Example 4. A manufacturer makes an unqualified claim that its package is compostable. The package will only break down in municipal composting facilities, not on home compost piles. The claim is not deceptive if the manufacturer qualifies the claim to explain the limitation.

Example 5. A nationally marketed lawn and leaf bag is labeled "compostable." The bag also contains a disclosure that it is not designed for use in home compost piles. Community yard waste compost programs are not available to a majority of the consumers where the bag is sold. The claim is not deceptive.

Example 6. A manufacturer sells a disposable diaper with the legend "This diaper can be composted where municipal composting facilities exist. There are currently [X number of] municipal solid waste composting facilities across the country." The claim is not deceptive, provided the numbers are accurate and the claim can be substantiated.

Example 7. A manufacturer markets yard waste bags only to consumers residing in particular geographic areas served by county yard waste composting programs. The bags meet specifications for the programs and are labeled, "Compostable Yard Waste Bag for County Composting Programs." The claim is not deceptive.

[160] 16 C.F.R. § 260.7(d).

[161] *Id.* To illustrate its point, the Commission provided the following examples:

Example 1: A packaged product is labeled with an unqualified claim "recyclable." Reasonable consumers cannot tell from the type of product, or other context, whether the claim refers to the product or package. The claim is deceptive.

Example 2: A plastic package is labeled on the bottom with the Society of the Plastics Industry (SPI) code consisting of arrows in a triangular shape containing a number and an abbreviation identifying the component plastic resin. Use of the SPI symbol (or similar industry codes) does not constitute a claim of recyclability. There is no deception.

Example 3: A container can only be burned in incinerator facilities to produce heat and power. The container cannot be recycled into new products or packaging. The claim is deceptive.

Example 4: A nationally marketed bottle bears the unqualified statement that it is "recyclable." Collection sites for the material in the bottles are not available to a

4. Recycled Content. According to the Guides, the FTC only permits recycled content claims to be made for materials that have been recovered or otherwise diverted from the solid waste stream either during the manufacturing process (pre-consumer), or after consumer use (post-consumer).[162] Otherwise, the claim will be deceptive. If the number of examples is any indication, recycled content claims have been particularly troublesome.[163]

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substantial majority of consumers or communities. The unqualified claim is deceptive since reasonable consumers not living in areas served by the recycling programs may conclude the program is available to them.

Example 5: A soda bottle is marketed nationally and labeled, "Recyclable where facilities exist." Recycling programs that can accommodate the material are available: (1) in a significant number of communities; and (2) to a significant percentage of the population. However, the programs are not available to a substantial number of consumers. The claim is deceptive.

Example 6: A plastic detergent bottle is marketed as follows: "Recyclable in the few communities with facilities for colored HDPE bottles." Collection sites for recycling the container have been established in a half-dozen major metropolitan areas. The claim is not deceptive.

Example 7: A label claims that the package "includes some recyclable material." The package is made of four layers of different materials, bonded together. Only one layer is made of recycled material. Few recycling programs are capable of separating the layer made of the recycled material. Although the claim is accurate technologically, it is deceptive absent further qualification.

Example 8: A product sold and distributed in Missouri is marketed as having a "recyclable" container. Collection sites are available to a substantial majority of Missouri residents, but not nationally. The claim is not deceptive.

[162] 16 C.F.R. § 260.7(e).

[163] *Id.* To illustrate the point, the Guides contain the following examples:

Example 1: A manufacturer routinely collects spilled raw materials and scraps from trimmed finished products. With little reprocessing, the manufacturer combines the spills with virgin material to produce new products. A claim that these new products contain recycled material is deceptive since the spills would never have entered the solid waste stream.

Example 2: A manufacturer purchases material from a firm that collects discarded material from other manufacturers and resells it. The manufacturer includes the weight of this material when calculating the recycled content of its products. A claim of recycled content based on this calculation is not deceptive.

5. Source Reduction. The FTC addresses source reduction from two perspectives: physical and chemical. Accordingly, "it is deceptive to misrepresent, directly or by implication, that a product or package has been reduced or is lower in weight, volume or toxicity.[164] The claim will not be deceptive, however, if the source reduction claim is qualified (as much as necessary) to explain the amount or the basis for any comparison being made.[165]

Example 3: A greeting card is composed 30% by weight of paper collected from consumers after use of a paper product, and 20% by weight of paper that was generated after completion of the paper-making process. The paper from the manufacturing process would not normally have been reused. The marketer of the card may either: (1) claim that the product "contains 50% recycled material;" or (2) identify the percentages of pre-consumer and post-consumer material content.

Example 4: A package with 20% recycled content by weight is labeled as containing 20% recycled paper. Some of the recycled material came from products which consumers had used while the rest came from newspaper stock which was never sold to consumers. The claim is not deceptive.

Example 5: A product in a multi-component package, such as a paperboard box in a shrink-wrapped plastic cover, indicates that it has recycled packaging. The box is made of recycled material, but the wrap is not. The claim is deceptive since, without qualification, it suggests that both components are made from recycled material.

Example 6: A package is made from layers of foil, plastic, and paper laminated together, although the layers cannot be distinguished by consumers. The label claims that "one out of three layers of the package is made from recycled plastic." The claim is not deceptive, provided the claim is indeed true.

Example 7: A paper product is labeled as containing "100% recycled fiber." The claim is not deceptive if the advertiser can substantiate the conclusion that 100% by weight of the fiber in the finished product is recycled.

Example 8: The packaging for a frozen dinner consists of a cardboard box over a plastic tray. The package bears the legend, "package made from 30% recycled material." The box is 20% recycled content by weight, while the plastic tray is 40% recycled content by weight. The claim is not deceptive, since the average amount of recycled material is 30%.

Example 9: A paper greeting card is labeled as containing 50% by weight recycled content. The amount of recycled material in the paper stock varies depending upon the source. As long as the 50% figure is based upon the annual weighted average of the recycled material process, the claim is permissible.

[164] 16 C.F.R § 260.7(f).

[165] *Id.* To illustrate this point the Guides contain the following examples:

6. Refillable. According to the Guides, manufacturers and advertisers should only market products with unqualified "refillable" claims if the means to refill the container are already in place.[166] If, however, it is up to the consumer to find new ways to refill the container, the term may not be used at all.[167]

7. Ozone Safe and Ozone Friendly. Under the Guides, a claim that a product does not harm the ozone layer is deceptive if the product contains any ozone-depleting substances.[168] Therefore, according to the FTC, it would be deceptive to claim that such a product is "safe for" or "friendly to" the ozone layer.[169]

Example 1: An ad claims that solid waste created by disposal of the advertiser's packaging is "now 10% less than our previous package." The claim is not deceptive, provided the manufacturer can substantiate the claim.

Example 2: An advertiser notes that disposal of its product generates "10% less waste." Since the claim could either be a comparison with the immediately preceding product or to a competitor's product, the claim is ambiguous.

[166] 16 C.F.R. § 260.7(g). An unqualified refillable claim should not be asserted unless a system is provided for :

(1) The collection and return of the package for refill; or

(2) The later refill of the package by consumers with product subsequently sold in another package.

[167] *Id.* The Guides provide the following examples for sellers:

Example 1: A container is labeled "refillable x times." The manufacturer is capable of refilling the containers and can show they can withstand being refilled "x times." However, the manufacturer has not established a collection program. The unqualified claim is deceptive.

Example 2: A bottle of fabric softener states that it is in a "handy refillable container." Consumers are expected to refill the container from larger sized containers which the manufacturer also sells. Since there is a means for consumers to refill the smaller container from the larger containers, the claim is not deceptive.

[168] 16 C.F. R. § 260.7(h).

[169] *Id.* To illustrate the point, the Commission gave the following examples:

Example 1: A product is labeled "ozone friendly." If the product contains any ozone depleting substances at all, the claim is deceptive.

Example 2: The seller of an aerosol product makes an unqualified claim that its product "Contains no CFCs." The product does not contain CFCs, but it does contain other ozone depleting substances. The claims is deceptive.

Example 3: A product is labeled "This product is 95% less demanding to the ozone layer than past formulations that contained CFCs. The manufacturer has substituted

Whether or not the Guides will be an effective tool in regulating environmental advertising remains to be seen. For its part, the FTC is claiming a qualified victory.[170] In the meantime, the only real evidence of the Guides' impact on the market can be found in a study[171] conducted by four university professors. The results of the study indicate that overall, the FTC Guides did not have a "chilling effect" on marketers "propensity" to make environmental claims.[172] While the number of "source reduction" and "recycled" claims have increased dramatically, they have become more specific.[173] Recyclability claims continue to be a problem, however. In other words, environmental marketing claims are still big business.

Substantively, the Guides track the suggestions in Green Report II quite closely. For example, the Attorneys General recommended that a distinction should be made between the environmental aspects of a product and the environmental attributes of its packaging.[174] The FTC responded in kind with the second general principle which encourages/advises marketers to make it clear whether the environmental attribute being claimed applies to: (1) the product; (2) its packaging; or (3) to a portion or component

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HCFCs for CF-12, and can substantiate that this substitution will result in 95% less ozone depletion. The qualified comparative claim is not likely to be deceptive.

[170] Federal Trade Commission Report to Congress Pursuant to the Federal Trade Commission Act Amendments of 1994, February 1994. But see Kevin M. Bank, *How Green is My Product and Package: The Federal Trade Commission's Environment Marketing Guides,* 49 Food and Drug Law Journal 499, 500 (1994); Antitrust & Trade Regulation Report, News and Comment, April 27, 1995.

[171] Robert B. Mayer et. al., *Trends in Environmental Marketing Claims Since the FTC Guides: Two-Year Auditing Results,* 41 Consumer Interests Annual (1995). The study involved claims of all brands in sixteen product categories ranging from aerosol shaving cream to liquid dish detergents to coffee filters. Audits were conducted at six month intervals from September 1992 to September 1994. at five strategically selected locations: New York City, NY; Champaign-Urbana, IL; Salt Lake City, UT; San Diego, CA; and Corvallis, OR. [hereinafter Trends]

[172] *Id.* at 3.

[173] General environmental claims, brand-name claims, degradability of plastic claims, and ozone claims either declined in frequency or remained at low numbers. Trends, *supra* note 174, at 6.

[174] Green Report II, *supra* note 75, at 8.

of the product's packaging.[175] The issue of degradability was handled in much the same manner. In Green Report II, the Attorneys General recommended that products currently disposed of primarily in landfills not be promoted as being "degradable," biodegradable," or "photodegradable."[176] The FTC obliged by suggesting that sellers should qualify their claims of degradability to reflect the circumstances under which degradation will occur. Or, in the alternative, sellers should be able to substantiate the degradability claims being made.[177] There are similar parallels between the remaining recommendations made by the Attorneys General and the substantive portions of the Guides. Thus, the FTC should not be criticized as having avoided some of the more difficult aspects of environmental marketing. Rather, the Commission is to be commended for its thoroughness and timeliness.

In spite of its best efforts, the FTC's ability to truly impact environmental marketing will always be hampered because of its vantage point on the problem. Since its authority under section 5 of the FTC Act is limited to preventing deceptive or unfair acts or practices, the Commission can only view environmental claims retrospectively, not prospectively. As a result of this limitation, the FTC's authority/power to improve or protect the overall environment is virtually non-existent. The FTC's emphasis is clearly on the marketing aspect of the claims, rather than on the environmental aspect of the claims. The FTC's ability to improve the environment is further constrained by its relative lack of enforcement authority. For example, when two hair sprays were advertised as being

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[175] 16 C.F.R § 260.6(b), *supra* note 158.
[176] Green Report II, *supra* note 75, at 18.
[177] 16 C.F.R. § 260.7(b), *supra* note 158.

"environmentally safe"[178] and as containing an "environmental formula,"[179] the Commission could only issue consent orders to address the deceptive claims. Another deceptive environmental claim was resolved in exactly the same manner. Consider the "biodegradable" representations Keyes Fiber Company made in promoting its Chinet® disposable tableware:

> While not everyone is in agreement with regard to solid waste management, most concur that a solution can be found in the combined use of landfills, recycling/composting and waste-to-energy incineration. Concerned consumers can feel confident that Chinet® paper plates perform in whatever disposal method is used in their community.[180]
>
> We have commissioned independent studies which compare the biodegradability of molded fiber paper, laminated paper, plastic and polystyrene foam. The studies show that Keyes molded fiber paper products biodegrade faster than any other materials. In fact, [the Chinet®]

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[178] Demert and Dougherty, FTC Docket No. C-3456 (Aug. 17, 1993) (final consent order). The label on the company's "All Set Hairspray" contained the words "Environmentally Safe." The claim, which the FTC found to be unsubstantiated, represented to the public that the hair spray product did not contain any ingredients that harmed or damaged the environment. The Commission ordered Demert and Dougherty to cease and desist making such representations unless the company possessed competent and reliable evidence to substantiate its claims.

[179] Redmond Products, Inc., FTC Docket No. C-3479, August 17, 1993 (final consent order). Redmond Products Inc. put the phrases "Environmental Formula," and "Contains Natural Propellants and No Fluorocarbons" on the labels of its Aussie Mega Styling Spray and New Zealand Hair Paradise Hairspray. The back panel of the products read as follows:

- This advanced environmental formula is a blend of the finest ingredients from nature and science; containing natural propellants and fluorocarbons.
- Being Considerate of Your Environment Doesn't Mean Giving Up Sprays and Gels.
- Environmentally Formulated.

Finding the claims to be unsubstantiated, the FTC ordered Redmond Products to cease representing that its products did not contain any products that were damaging to the environment.

[180] Keyes Fiber Company, FTC Docket No. C-3512, (20 July 1993) (final consent order). Keyes further represented that its products were

- Fully biodegradable and that they degraded much faster than most ordinary paper plates.
- Unlike foam and plastic alternatives, our molded fiber paper products are biodegradable and can be safely and efficiently disposed of in virtually any method of solid waste management, including waste-to-energy incineration and municipal composting.

Finding the claims to be unsubstantiated, the FTC ordered Keyes to cease representing that its products were 'degradable," "biodegradable," or "photodegradable." In addition, the FTC ordered the company to cease representing that its products offered any environmental benefits when placed into a sanitary landfill.

> molded fiber paper almost completely decomposed in two weeks, while plastic and foam products remained intact indefinitely.[181]

Keyes and the other manufacturers who used deceptive or misleading claims were able to avoid any financial liability (with the exception of attorneys fees) by merely consenting to change their advertising practices. Since the FTC's authority to issue civil penalties is limited to violations of cease and desist orders, the Commission lacks the authority to penalize manufacturers for past behavior. Even if the FTC were to issue binding guidelines, as some commentators suggest,[182] the financial benefits manufacturers can gain from deceptive environmental advertising claims far outweigh the risk of being caught. Moreover, the Commission does not have the expertise to develop the detailed definitions necessary to make the Guides more stringent. These weaknesses, when combined with FTC's ponderous case-by-case approach lend credence to the argument that EPA, not the FTC, should regulate environmental marketing claims. Yet, as indicated in the next section, there are similar limitations on EPA's ability to resolve the green marketing dilemma.

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[181] *Id.*

[182] *See* Grodsky, *supra* note 136, at 139.

IV. EPA's Involvement in Environmental Marketing

Before the FTC issued the Guides to Environmental Marketing Claims in July 1992, federal, state and local governments had focused their environmental marketing efforts on truth-in -advertising and consumer fraud.[183] Clearly, the impetus for the Guides was the nearly unanimous feeling among government officials, environmental groups and industry representatives that: (1) the current system was unworkable; and (2) definitive federal guidelines were needed to govern the use of environmental terms in advertising.[184] There was far less agreement, however, on what the purpose the national guidelines should serve or how specific they should be.[185] This debate centered around the fundamental question of whether environmental marketing is a commerce related issue under the jurisdiction of the FTC or whether it is a policy matter to be addressed by EPA.[186] Before addressing this difficult question, it is important to understand EPA's past and present role in environmental marketing.

Unlike the FTC, EPA does not have a statutory mandate to issue regulations concerning either the "commercial" or "environmental" aspect of green marketing.[187] The EPA's involvement in the decision making process was as a member of a Federal Task Force, which consisted of the FTC, the U.S. Office of Consumer Affairs and EPA. The Federal Task Force was created to enhance and coordinate the environmental marketing

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[183] EPA Evaluation, *supra* note 2, at i.
[184] *Id.* at vii.
[185] *Id.* at vii.
[186] *Id.* at vii.
[187] The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C.A. § 136 *et seq.*, requires labels to be placed on the containers of every pesticide product in the United States. EPA's Office of Pesticides Programs implements the statute. In addition, the Toxic Substances Control Act, 15 U.S.C.A. § gives EPA authority to require warning labels to be placed on certain hazardous chemicals.

activities taking place within the individual agencies.[188] For its part, EPA responded to the pleas for federal action by commissioning a study on the use of environmental marketing terms in the United States.[189] The report, which documents the results of the underlying study, was designed to serve two purposes: (1) to provide state and federal policy makers with an analytical foundation for their policy decisions; and (2) to be a comprehensive source of information for anyone who was interested in environmental advertising.[190] Presumably, the EPA used the results of the study to fulfill its role on the Federal Task Force.

A. Statutory Alternatives

EPA's role in environmental marketing would have changed dramatically if either of two proposed pieces of legislation had been enacted by Congress. The first piece of proposed legislation was Senator Frank Lautenberg's Environmental Marketing Claims Act of 1991 (the Lautenberg Act).[191] Approximately one year later, in 1992, Representative Al Swift proposed the Environmental Marketing Claims section of the National Waste Reduction, Recycling, and Management Act (the Swift Act).[192] Although both bills had the same objective--federal regulation of green marketing claims, the legislators went about the task in slightly different ways.

Under the Swift Act, the FTC was to use regulations promulgated by the EPA Administrator to determine what constituted unfair or deceptive acts or practices in or

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[188] 56 Federal Register 49994.
[189] EPA Evaluation, *supra* note 2, at ii.
[190] *Id.* at ii.
[191] S. 615, 102d Cong., 1st Sess. (1991).
[192] H.R. 3865, 102d Cong., 2d Sess. (1992). [Hereinafter the Swift Act].

affecting commerce. [193] The Administrator's authority to promulgate regulations was not without limit. The regulations had to: (1) include standards and criteria for substantiating claims about the specific environmental impact of product or a package;[194] and (2) be sufficient to allow the FTC to determine if the substantiation was adequate and whether deception had occurred.[195] Moreover, the criteria and standards in the regulations had to be based upon the best available scientific information.[196] The Swift Act then went on to discuss the requirements relating to specific claims, such as "recycled,"[197] and "recyclable."[198] An advertiser's ability to market a product with the terms "recycled" and "recyclable" became more restrictive with the passage of time. For example, a product or package could not be described as recycled unless the percentage of postconsumer materials was not less than 25 percent (by weight) from the date of the regulations until

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[193] Swift Act, Sec 4403(c).

[194] Sec. 4403(d)(2) stated: The regulations under subsection (a) shall include standards and criteria for substantiating claims to the effect that a product of package-

(A) is source reduced;
(B) is refillable;
(C) is reusable;
(D) is recyclable;
(E) has a recycled content;
(F) is compostable
(G) is ozone neutral;
(H) is nontoxic;
(I) is photodegradable;
(J) is biodegradable;
(K) is degradable; or
(K) is decomposable.

The Administrator shall include standards and criteria for substantiating such other claims related to a specific environmental impact or attribute of a product or package as the Administrator considers appropriate.

[195] *Id.* Section 4403(d)(3): The Administrator shall ensure that the criteria and standards contained in the regulations are sufficient to allow the Federal Trade Commission -

(A) to determine whether an environmental marketing claim has adequate substantiation with respect to a specific environmental impact or attribute; and

(B) to ensure that claims are not deceptive or environmentally detrimental (I) as a result of stating the absence of an environmental attribute that is not a usual characteristic of a product, package, or package category, or (ii) in light of other characteristics of the product or package.

[196] Swift Act, Section 4403(d)(4).

[197] Swift Act, Section 4403(e)(1)(A).

December 31, 1999. Thereafter, the term could not be used unless the package or product contained not less than 50 percent (by weight) of postconsumer materials after January 1, 2000.[199] This not so subtle attempt to encourage recycling and decrease solid waste was also used in the Lautenberg Act. The Swift Act precluded the issuance of environmental certifications or the awarding of seals-of-approval unless the criteria and standards upon which they were based were at least as stringent as those set forth in the regulations.[200] In what appears to be a final attempt to maintain uniformity, states were precluded from establishing criteria or standards which differed from the federal regulations. States did retain the authority to enact and enforce standards and criteria for any environmental marketing claims which the federal regulations would not have addressed.[201]

By comparison, the Lautenberg Act is the more comprehensive of the two proposed bills. As such, it appeared much more like the typical environmental regulation we are accustomed to seeing. The bill had clearly defined purposes[202] as well as a set of definitions for a variety of terms such as "product," "package," "life cycle," and "pre- and post-consumer material."[203] The Lautenberg Act provided for the establishment of an

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198 Swift Act, Section 4403(e)(2)(A).
199 Swift Act, Section 4403(e)(1)(A)(i)(I).
200 Swift Act, Section 4403(g).
201 Swift Act, Section 4403(i).
202 The Lautenberg Act Section 2(b): The purposes of the Act are to:
(1) prevent the use of fraudulent, deceptive, and misleading environmental marketing claims;
(2) empower consumers with reliable and consistent guidance to facilitate value comparisons with respect to environmental marketing;
(3) establish uniform, accurate standards and definitions that reflect the best available manufacturing practices, products, and packaging;
(4) encourage the development of innovative technologies and practices to be adapted by manufacturers in considering the environmental effects when producing products and packages; and
(5) encourage both consumers and industry to adopt habits and practices that favor natural resource conservation and environmental protection.
203 Lautenberg Act, Section 3.

environmental marketing claims regulatory program.[204] The program was to have been based upon regulations issued by the EPA Administrator using the recommendations of an Independent Advisory Board. To ensure diversity, the Board was to be composed of consumer advocates, industry representatives, environmental organization representatives as well as state and local officials.[205] Specifically, the regulations were to govern the use of specific environmental marketing claims ranging from source reduced to nontoxic.[206] Moreover, the Administrator's regulations were to ensure that environmental marketing

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[204] Lautenberg Act, Section 4.

[205] Lautenberg Act, Section 5. The Board shall consist of 15 members, including 4 ex officio members, who shall be appointed be the Administrator as follows:

(A) Three members who are recognized as consumer advocates, one of which is a recognized expert in marketing or consumer perception;

(B) Five members representative of industry and manufacturing, including-

(i) One retailer

(ii) One manufacturer

(iii) One recognized waste management expert in the private sector; and

(iv) One end user of post-consumer materials.

(C) 3 members representative of environmental organizations, of which 1 member is a recognized expert in soil science or environmental toxicology.

(D) Two members who shall serve ex officio who are officers or employees of State government, and of which-

(i) One member is recognized [as a] expert in consumer protection;

(ii) One member who is recognized as a waste management, pollution reduction, or pollution prevention expert;

(E) One member who is an officer or employee of a local government and is engaged in pollution prevention or waste management or a municipal recycling program or consumer protection who shall serve ex officio.

(F) One member who is an officer or employee of the National Institute of Standards and Technology, who shall serve ex officio.

[206] Lautenberg Act, Section 6(b). The Administrator. . . shall. . . promulgate final regulations governing the use of environmental marketing claims, including statements to the effect that a product or package is-

(A) source reduced;

(B) refillable;

(C) reusable;

(D) recyclable;

(E) has a recycled content;

(F) compostable;

(G) ozone neutral;

(H) nontoxic; or

(I) otherwise related to an environmental impact or attribute.

claims were not false, misleading, or deceptive. The use of general environmental seals-of-approval was not to be precluded.[207]

Unlike the Swift Act, the Lautenberg Act did not depend upon the FTC for enforcement. Manufacturers who intended to use a regulated marketing claim had to certify that their use of a term met the requirements of the Act.[208] Failure to comply with the regulations or to submit the required certification could have resulted in a civil penalty not to exceed $25,000 for each violation.[209] Enforcement actions could have been pursued by either individual states or private citizens.[210] Under the Bush administration neither the FTC nor EPA was inclined to adopt regulations which would have been binding on companies.[211] Apparently, Congress agreed with that position. Nevertheless, both the Swift Act and the Lautenberg Act were considered to have some merit by those who were in favor of a federal green marketing scheme.[212] Even though neither bill became law, both the Swift Act and the Lautenberg Act are noteworthy.

B. Executive Order 12873

Within the past three years, EPA's ability to affect a shift toward more environmentally benign products has become more defined. Until then there was no clearly stated federal policy to promote either the manufacture or the use of such products. On October 20, 1993, President Clinton issued Executive Order 12873 (E.O. 12873) entitled "Federal Acquisition, Recycling, and Waste Prevention."[213] One of the

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[207] Lautenberg Act, Section 6(b)(2).
[208] Lautenberg Act, Section 7.
[209] Lautenberg Act, Section 8.
[210] Lautenberg Act, Sections 10 and 11.
[211] Peter J. Tarnsey, *Regulation of Environmental Marketing: Reassessing of the Supreme Court's Protection of Free Speech,* 69 NOTRE DAME L. REV. 533, 535 (1994).
[212] *See* Israel, *supra* note 14, at 325.
[213] Exec. Order No. 12,873, 58 Fed. Reg. 54911 (1993).

purposes[214] of E.O. 12873 was to spur the private sector's development of new technologies and use of recycled and environmentally preferable products.[215] By requiring federal executive agencies to purchase such items, the Administration hopes to ultimately increase the number of environmentally benign products that are available to the average consumer. This concept of improving the market though federal purchases has merit since the government purchases over $200 billion worth of goods and services each year.[216] At present, there is a large gap between the goal of E.O. 12873 and the accomplishment of its objective. With the current state of environmental marketing, how are the executive agencies supposed to decide which products really have a lesser or reduced effect on human health and the environment?[217] EPA must bridge that gap.

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[214] *Id.* The opening proclamation of E.O. 12873 reads as follows:

WHEREAS, the Nation's interest is served when the Federal Government can make more efficient use of natural resources by preventing waste wherever possible;

WHEREAS, this Administration is determined to strengthen the role of the Federal Government as an enlightened, environmentally conscious and concerned consumer;

WHEREAS, the Federal Government should--through cost-effective waste prevention and recycling activities--work to conserve disposal capacity, and serve as a model in this regard for private and other public institutions; and

WHEREAS, the use of recycled and environmentally preferable products and services by the Federal Government can spur private sector development of new technologies and use of such products, thereby creating business and employment opportunities and enhancing regional and local economies and the national economy. . . *Id.*

[215] *Id.* "Environmentally preferable" is defined in Section 201 as products or services that have a lesser of reduced effect on human health and the environment when compared with competing products or services that serve the same purpose. This comparison may consider raw materials acquisition, production, manufacturing, packaging, distribution, reuse, operation, maintenance, or disposal or the product or service. *Id.*

[216] *Concept Paper for the Development of Guidance for Determining "Environmentally Preferable" Products and Services,* Environmental Protection Agency, Office of Pollution Prevention, January 28, 1994 [hereinafter Concept Paper].

[217] In response to Executive Order 12873 and other regulatory influences such as RCRA, NEPA and CAA, the Federal Supply Service, U.S. General Services Administration, issued its *1994 Environmental Products Guide,* formerly called the *Recycled Products Guide.* The Guide was designed to help "federal civilian and military agencies identify environmentally oriented products and services" which available through the federal supply system. The specific attributes of all of the items listed in the Guide are described using an "environmental annotation" such as "50% Waste Paper, Include. 10% Post-Consumer Recovered Material." The notations may apply to either specific items or categories or product categories.

In section 503 of E.O. 12873, EPA is assigned the task of issuing guidance for federal agencies to use in making the required determinations.[218] According to EPA, the goal of section 503 is to "harness the Federal government's purchasing power to promote markets for products and services that result in less risk to human and ecological health."[219] By issuing the guidance, EPA seeks to give the Executive agencies a set of guiding principles that can be used to identify, select and purchase products and services that have fewer environmental burdens.[220] Arguably, EPA has stepped into the shoes of the ordinary consumer who must decipher labels and claims in an attempt to select products which have the least impact on the environment. Although EPA's goal in issuing the guidance is to reach all federal employees as consumers of goods and services, the accomplishment of that goal is far from certain.[221] "Whether environmental goals can be achieved through market signals will depend upon the willingness of individuals to request and purchase products and services that are environmentally preferable."[222] Thus, the ultimate power to improve the environment through the market will continue to be in the hands of the consumer.

As might be expected, numerous groups had a stake in how the federal government was going to address the proliferation of environmental advertisements.[223] Consequently, the Federal Task Force had a tremendous amount of information to

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[218] Executive Order 12,873 Section 503 requires EPA to issue guidance that recommends principles that Executive agencies should use in making determinations for the preference and purchase of environmentally preferable products. The proposed guidance was to be issued for public comment in the Federal Register within 180 days after the effective date of the order.

[219] Concept Paper, *supra* note 221, at 1.

[220] *Id.* at 1.

[221] *Id.* at 2.

[222] *Id.*

[223] EPA Evaluation, *supra* note 2, at 104-109.

synthesize before making its decision. Environmental marketing claims could have been addressed by: (1) FTC industry guides; (2) FTC case-by-case enforcement; (3) EPA Guidance for Specific Terms; or (4) more general guidance that applied to a general category of claims issued by EPA or jointly by the Task Force.[224]

The preference among industry groups was that the national guidelines be voluntary and promote truth-in-advertising.[225] Consumer groups, environmental groups and some state agencies, agreed that environmental labeling indeed should be truthful. However, they took a broader view of the situation than the industry groups and advocated that environmental labeling should be used to promote products that have fewer adverse impacts on the overall environment, in other words, "environmentally preferable products." Thus, the consumer and environmental groups encouraged the federal government to use the issue of environmental labeling as a policy tool.[226] Some commentators still believe the decision to give the FTC responsibility for defining environmental marketing claims was incorrect.[227] It is the EPA, they argue, and not the FTC that has expertise in defining technical environmental terms. While it is true that EPA does have the expertise to address the technical aspect of environmental marketing, there are several reasons why the agency might not otherwise be up to the task.

First of all, EPA is already overwhelmed with its responsibilities for improving the quality of the nation's air, soil and water. The agency's reputation for failing to issue mandatory regulations in a timely manner is well known. With EPA's traditionally high

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[224] Federal Register Notice 49994.
[225] EPA Evaluation, *supra* note 2, at 110.
[226] *Id.*
[227] *See* Welsh, *supra* note 16, at 1022 and Grodsky, *supra* note 136, at 176-177.

turnover rate among its employees and the further reduction of an already limited budget, EPA no longer has the resources to resolve the environmental marketing crisis. Judging from EPA's past performance, it could literally take years for the agency to promulgate regulations on environmental marketing. In addition, EPA lacks the credibility with the American public and industry which is necessary to run an effective program. A portion of Congress, in its wisdom, is attempting to make EPA the scapegoat for writing the regulations to implement the legislation which the politicians have drafted, enacted and imposed upon the American people. Refusing to accept responsibility for unpopular laws, such as the Endangered Species Act, Congress has pointed a finger at the "regulators" thereby further damaging EPA's already tarnished reputation. Unlike other areas of the law, environmental marketing is uniquely dependent upon the public for its success. Without credibility it is difficult to see how such a beleaguered agency could have much of an impact upon environmental marketers or the public in the absence of new legislation. As evidenced by the rejection of both the Swift Act and the Lautenberg Act, Congress is not inclined to use environmental marketing as a policy tool.

Neither the FTC nor EPA is ideally suited to resolve the environmental marketing problem. As one commentator has so aptly stated, "the agency with enforcement expertise lacks the appropriate mission, and the agency with the mission lacks enforcement authority."[228] Considering the inability of the FTC and EPA to resolve the environmental marketing situation independently, the ideal solution seems rather obvious: have the two agencies combine their strengths to promulgate a comprehensive set regulations to address the environmental marketing issue. Yet, until consumers play a more active role in the

[228] Godsky, *supra* note 136, at 176.

process by becoming educated in how to interpret/assess the information being presented to them in the claims, the regulations will still only have a limited effect. With EPA's recent mandate to issue guidance for federal agencies to use in selecting environmentally preferable products, at least some progress is being made.

V. Life Cycle Assessment

Consumers who wish to purchase environmentally preferable products face a rather large obstacle. It is difficult, if not impossible, for the average consumer to assess the environmental attributes of a product.[229] A marketing claim which meets the requirements of the FTC guidelines does not identify the product's environmental burdens.[230] In order to measure the total environmental impact of a product, someone must consider each impact that a product has on the environment at various stages of the product's life.[231] This cradle-to-grave type of analysis is commonly referred to as a product life cycle assessment or alternatively, life cycle assessment. In an ideal situation, a life-cycle assessment can be used as a tool to measure just how green a "green" product really is.[232] Theoretically, the information derived from such an assessment would be passed on to the consumer who would, in turn, use it to decide which environmentally preferable product to purchase.

The concept of life cycle assessment has been around since 1969[233] yet, it is still evolving.[234] From 1990-1993 a major national and international effort was undertaken to develop the life cycle assessment tool to the point of scientific acceptance and policy relevance.[235] EPA and the Society for Environmental Toxicology and Chemistry were two

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[229] Office of Pollution Prevention and Toxics, United .States. Environmental Protection Agency, Determinants of Effectiveness for Environmental Certification and Labeling Programs, EPA 742-R-94-001, 1 [hereinafter EPA Determinants].
[230] *Id.* at i.
[231] Church, *supra* note 8, at 259.
[232] *Id.*
[233] Wynne, *supra* note 5, at 65
[234] Office of Pollution Prevention and Toxics, United States Environmental Protection Agency, The Use of Life Cycle Assessment in Environmental Labeling Programs, EPA/742-R-93-003, 3 [hereinafter EPA Life Cycle Assessment].
[235] *Id.* at 3.

of the participants in that effort. From EPA's perspective, a life cycle assessment is a holistic approach to evaluating the environmental effects of a product or activity which includes an analysis of the entire life cycle of a particular product, process or activity.[236] EPA's life cycle assessment consists of three components--inventory, impact and improvement--and an integrative procedure known as scoping.[237] The international definition/description of life cycle assessment developed through the Society for Environmental Toxicology and Chemistry (SETAC) is more comprehensive:

> Life cycle assessment is an objective process to evaluate the environmental burdens associated with a product, process or activity by identifying and qualifying energy and materials used and wastes released to the environment, to assess the impact of those energy and material uses and releases to the environment, and to evaluate and implement opportunities to affect environmental improvements. The assessment includes the entire life cycle of the product, process or activity, encompassing extracting and processing raw materials; manufacturing, transportation and distribution; use, re-use, maintenance; recycling and final disposal.[238]

The product life-cycle assessment has four components: (1) goal definition and scoping; (2) inventory analysis; (3) impact analysis (assessment); and (4) improvement analysis (assessment).[239]

A. **Goal Definition and Scoping**. In this component the purpose of the study, the scope of the study, the functional unit being considered, and the procedure for the quality assurance of the results are established.[240] Once the nature of the study has been determined, the analyst must then move on to narrowing its scope. As one commentator states, "providing a "complete" assessment of the environmental impacts of a product

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[236] *Id.* at 2.
[237] *Id.*
[238] *Id.* at 3.
[239] *Id.* at 4.
[240] *Id.*

could become a Herculean task without a reasonable limit on the scope of the analysis."[241] During the scoping process, boundaries are set to ensure that the analysis addresses the purpose of the study.[242] Included in this component are the assumptions, data requirements, and limitations on which the entire study will be based.[243] Setting the boundaries for a life-cycle product system is not a simple matter. It requires the resolution of several key issues. For example, should the analyst consider all of the system's raw and intermediate material requirements or should she limit the scope of the investigation at the risk of ignoring important elements?[244] Similarly, if the analyst decides not to account for all of the emitted pollutants, which ones should she consider--those for which data more readily exists or all regular or fugitive emissions and wastes, regardless of the data's availability?[245]

B. **Inventory Analysis**. The inventory analysis component of life-cycle assessment is a "technical, data-based process of quantifying energy and raw material requirements, atmospheric transmissions, waterborne emissions, solid wastes and other releases for the entire life cycle of a product, package, process, material or activity."[246] While the methodology for inventory analysis is considered to be well-defined and understood, key issues such the sources, availability and quality of data and the including

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[241] Church, *supra* note 8, at 259.
[242] EPA Life Cycle Assessment, *supra* note 234, at 4.
[243] *Id.*
[244] Wynne, *supra* note 5, at 67. By way of example, the author asks if the analyst should consider all of the specific environmental impacts of locating, drilling, and transporting the particular barrels of oil used to manufacture a certain batch of plastic, or should she simply treat all batches of the type of plastic as environmentally equivalent and therefore omit oil production from the scope of the study? Including all the impacts requires a tremendous amount of site specific date. Excluding the impacts risks ignoring potentially significant differences in the actual environmental burdens imposed by deferent methods of oil production.
[245] *Id.*
[246] *Id.*

of waste management practices are still being discussed within the practitioner community.[247] One problem which arises during the inventory analysis is how to collect all of the relevant data for all of the environmental inputs and outputs that may cross the established boundaries.[248] Some of the data may be unavailable because it is confidential. Other data which is needed may be unavailable because neither the methodology nor the resources to gather that data exist.[249] Once the data is collected, the analyst must then decide how to use it.[250]

C. **Impact Analysis**. EPA defines impact analysis in life-cycle assessment as "a systematic process to identify, characterize, and value potential ecosystem, human health, and natural resource impacts associated with the inputs and output of a product or process system.."[251] On the other hand, SETAC's use of the term includes the sometimes qualitative nature of the process.[252] Generally, impact analysis is used to evaluate the significance of the results of a life cycle inventory including quantities of resources and energy used as well as specific pollutants or wastes released to the air, water, or soil during the stages of the life cycle.[253] Past life cycle studies applied a "less is best" approach by simply using the total energy consumed, total mass of natural resources used,

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[247] *Id.* at 4 Practitioners are also discussing the allocation procedures for co-products, and allocation of inputs and outputs in a system involving recycling..

[248] *Id.*

[249] Church, *supra* note 8, at 261.

[250] Wynne, *supra* note 5, at 68. According to the author, the computational models used to perform life cycle inventories (LCIs) involve many assumptions. For example, when a plant produces three products, environmental data from that plant will not likely be allocated to each product. If the plant uses X amount of electrical energy, how much was used for Product 1, Product 2, and Product 3? The analyst might resolve this issue of co-product allocation by employing a technique based simply on the relative weight of each product. Yet, other techniques exist, and choosing among them is an exercise of professional judgment, not an empirical determination mandated purely by observation or logic.

[251] EPA Life Cycle Assessment, *supra* note 234, at 5.

[252] *Id.*

[253] *Id.*

total mass of air pollutants, total mass of water pollutants, and total mass of solid wastes generated.[254] Such an approach does not allow tradeoffs between totally different types of potential impact to be evaluated.[255] Unfortunately for the consumer, the "less is best" rule is not likely to result in a clear winner. Products that are superior in one category may be inferior in another.[256] Just as the methodology for inventory analysis is still being discussed, there is still no generally accepted methodology for impact analysis.[257] However, there is some consensus on the conceptual framework for life cycle impact analysis.

D. **Classification, Characterization, Valuation**. The three steps on which agreement has been reached concerning impact analysis are: classification, characterization, and valuation.[258] Classification occurs when inventory items are assigned to impact categories (quantitative inputs and outputs from the life cycle inventory) which are the potential cause-and-effect linkages between inventory items and the ultimate impacts on human health, the ecosystem, and resources.[259] Here, the analyst examines the life cycle inventory data and attempts to identify relatively homogeneous groupings of impact categories of ecosystem, human health, natural resources, and other human welfare effects.[260] Characterization is the process by which, if possible, impacts within the impact categories are aggregated and quantified.[261] It involves an understanding of the environmental processes that lead from the inventory item to the ultimate impact of

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[254] *Id.*
[255] *Id.*
[256] Wynne, *supra* note 5, at 69.
[257] EPA Life Cycle Assessment, *supra* note 234, at 5.
[258] *Id.*
[259] *Id.*
[260] Wynne, *supra* note 5, at 70.
[261] EPA Life Cycle Assessment, *supra* note 234 at 5.

concern.[262] The step at which the different impact categories are considered in relation to each other is called valuation. Unlike the other two steps, valuation is a subjective process which depends upon social and cultural values and preferences.[263] According to one commentator, this framework is not as simple as it seems.[264]

E. **Improvement Analysis**. In the event an analyst does overcome the challenges presented by the first three components of a life cycle analysis, an improvement analysis (assessment) may be conducted. The improvement analysis is the life cycle assessment component in which the options for reducing the environmental impacts of the system (product) being studied are identified and evaluated.[265] If an inventory analysis reveals the aspects of the product life cycle which can be improved, further analysis may not be needed. On the other hand, an improvement analysis may be necessary when the results of the inventory analysis do not present a clear picture of the most significant stages of a life cycle or its most significant impacts.[266]

Whether or not life cycle assessments are an effective means of identifying environmentally preferable products is certainly open to question. As the following two examples from the "diaper wars" indicate, the results from life cycle assessments may

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[262] *Id.*

[263] *Id. at* 6.

[264] Wynne, *supra* note 5, at 71. The author further explains that in the classification phase, for example, the analyst must make a qualitative assessment of potential impacts of each item of the life-cycle inventory, searching literature to identify impacts that may not yet be fully identified and that may be influenced by a host of factors. Furthermore, unless the analyst is prepared to assess every impact that she identifies, she must make some qualitative decisions about which ones to exclude form the study. In the second phase, characterization, models that convert disparate date within a given impact group into common units of environmental harm are based on a number of qualitative assumptions and, more importantly, the more sophisticated models require data that is currently very difficult to obtain. Finally, the crucial valuation-of-disparate-impacts phase is inherently subjective because "developing a truly objective method for [assigning relative values to impact groups] is both impossible and inappropriate. . .

[265] EPA Life Cycle Assessment, *supra* note 234, at 6.

[266] *Id.*

prove to be even more confusing to consumers than some environmental marketing claims. In 1988 the National Association of Diaper Services (NADS) commissioned a study which concluded that disposable diapers contributed significantly to the solid waste disposal crisis.[267] The disposable diaper industry responded by sponsoring two studies of cloth and disposable diapers of its own. One study was conducted by Proctor and Gamble (P&G). The other was conducted by the American Paper Institute (API).[268] Although neither assessment concluded that either cloth or disposable diapers was clearly preferable, the results of the API study indicated that disposable diapers use less pre-consumer solid waste than cloth diapers.[269] Not surprisingly, NADS commissioned a study into the same matter. This second life cycle assessment concluded that cloth diapers laundered by a diaper service were better for the environment than disposable diapers.[270] How could two life cycle assessments of the same processes reach such different conclusions? The answer can be found in the underlying assumptions of each study. The analyst who performed the NADS study assumed that fifty percent of the cloth diaper users and five percent of the disposable diaper users flushed fecal matter before disposal.[271] The analyst who performed the API study reversed those figures and assumed that fifty percent of the disposable diaper users and five percent of the cloth diaper users flushed fecal matter before disposal.[272] The assumptions clearly affected the results of the studies. The NADS study indicated that cloth services used approximately 1,377 gallons of water per day while the API study indicated that diaper services used

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[267] Church, *supra* note 8, at 264.
[268] *Id.*
[269] *Id.*
[270] *Id.*
[271] *Id*

approximately 5,922 gallons of water per day.[273] To make matters worse, the conclusions concerning energy consumption were just as divergent.[274] Once again, the discrepancies can be explained by the differing energy usage assumptions.[275] Clearly, the contradictory results of these life cycle assessments would be of little use to consumers who are interested in protecting or preserving the environment.

A more complete look at life cycle assessments of cloth and disposable diapers can be equally confusing to consumers. Consider this example. Manufacturing cotton diapers requires raw cotton that has been cultivated, harvested, transported and milled. During each of these processes energy and water are consumed and pollutants are emitted.[276] Linen services use trucks fueled with gasoline to pick up the soiled diapers and transport them to the laundry facility.[277] Upon arriving at the laundry facility, the diapers are washed in 900 hundred pound capacity machines and then dried in natural gas fueled dryers.[278] Next, the cloth diapers are folded, sorted, placed into plastic bags and re-delivered to the consumers, again in a gasoline powered truck.[279] Energy consumption and water usage increases even more if the consumer launders the cloth diapers at home.[280]

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[272] *Id.*
[273] *Id.* at 265.
[274] *Id.* The study conducted by P&G found that cloth diaper usage consumes three times more energy than disposable diapers. The NADS Study found that usage of disposable diapers consumes seventy percent more energy than usage of cloth diapers.
[275] *Id.* Each study accounted for co-generation differently. The P&G Study counted co-generation as an energy credit thereby reducing consumption. The NADS Study did not provide any credit because it assumed that co-generation produced air pollution..
[276] Luehr, *supra* note 1, at 321.
[277] *Id.*
[278] *Id.*
[279] *Id.*.
[280] *Id.*

By contrast, disposable diapers begin as crude oil and raw timber which are transported and processed into plastic resin and paper.[281] As in the case of cloth diapers, energy and water are consumed and pollutants are emitted during the manufacturing process. However, even more water and energy are consumed and more pollutants emitted during the manufacturing, packaging and distribution of the disposable diapers to warehouses and retail outlets.[282] Disposable diapers are hauled away from consumers' homes in garbage trucks and dumped in landfills where they will remain for centuries.[283] By comparison, disposable diapers create more solid waste than cloth diapers, but cloth diapers consume cause more water to be consumed.[284] Supporters of cloth diapers say that water pollutants from disposable diapers are more toxic, yet cloth diapers discharge more waste into the water supply.[285] Finally, cloth diaper advocates assert that air emissions from both types of diapers are about equal. As if the waters weren't muddied sufficiently already, producers of disposable diapers claim that air emissions from cloth diapers are significantly higher.[286] Based upon the preceding examples, even the most well intentioned and enthusiastic "green" consumers would find it difficult, if not impossible to chose between cloth and disposable diapers.

Although "cradle-to-grave" assessments of some products have been attempted, there is no consensus among the scientific community on just how the environmental impacts should be measured.[287] Perhaps life cycle assessments would become more useful

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[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *Id.*
[286] *Id.* at 22. Producers of disposable diapers claim that emissions from cloth diapers are two to nine times higher.
[287] Church, *supra* note 8, at 265.

if a few additional steps were taken. First, analysts could render their studies more valid by clearly explaining the assumptions they have made to consumers and by subjecting their work to peer review.[288] In the alternative, national testing protocols could be established to ensure consistency from one assessment to another.[289] Complete product life-cycle assessments are both expensive and time intensive. Therefore, a "streamlined" life-cycle assessment may be more appropriate in certain situations. A streamlined life cycle assessment does not attempt to collect data for every single input and output for every component of a product in every stage of the life-cycle.[290] Not surprisingly, the practitioner community does not agree on whether or how streamlined life cycle assessments should be done.[291] Nevertheless, such assessments are currently being used in some environmental labeling programs.[292]

Based upon the results of the disposable versus cloth diaper life cycle assessments, it is clear that the information from such studies can vary dramatically depending upon the underlying assumptions which are used. For this reason some critics seem to be willing to completely dismiss any usefulness which life cycle assessments may have. Yet, measuring the environmental attributes or impacts of products should not be an all or nothing proposition. Arguably, the entire field of environmental law is replete with scientific uncertainty. For example, one of the most controversial aspects of any remediation project is deciding just how clean the soil must be before local residents will be adequately

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[288] Wynne, *supra* note 5, at 71.

[289] Green Report I, *supra* note 4, at 21. In addition to seeking uniform definitions, the Task Force recommended that the federal government develop testing procedures and standards for determining whether a product would meet one of the uniform definitions. The Task Force believed national testing protocols would be especially useful in product life assessments.

[290] EPA Life Cycle Assessment, *supra* note 234, at 6.

[291] *Id.*

[292] *Id.*

protected from the risk of cancer. Although those who are conducting the cleanup and those who must continue living near the site may not agree on the details, neither group would conceive of maintaining the status quo because of scientific uncertainty. On the contrary, all of the parties would agree that some measure of "clean" is better than doing nothing at all. Similarly, having at least some scientific information about the environmental impacts of products is better than relying entirely on the marketers' representations. As long as life cycle assessments continue to be discussed in terms of absolutes here in the United States, there will be little incentive to improve the methodologies currently being used. Without the "threat" of life cycle assessments many manufacturers won't even attempt to change their products. Rejecting life cycle assessments outright on the basis of scientific uncertainty is a luxury we cannot afford.

The importance of protecting the environment through the products we purchase cannot be overemphasized. There is clearly a link between the purchasing decisions consumers make and the quality of a nation's environment. Recognizing that few consumers have the time, skills or tools to "search" for the best products themselves, many foreign countries have developed government sponsored environmental certification programs. Designed to assist consumers in making better purchasing decisions, these programs frequently employ simplified life cycled assessments. As a result, their consumers do not have to rely upon environmental marketing claims as their primary source of information about the products they buy.

VI. Environmental Certification Programs

Neoclassical economic theory assumes that, in order to make rational decisions, consumers must have access to all information which is relevant to their decision-making.[293] Currently, there are several types of imperfections in the information individual consumers receive. EPA has identified three imperfections as being the most significant. First, individuals may not have sufficient information with which to make decisions.[294] Environmental marketing claims are a prime example of this imperfection. Second, individuals may not know the limitations of the information they are receiving.[295] For example, a consumer wishing to choose between cloth and disposable diapers may not know that the analyst who performed the life cycle analysis assumed that fifty percent of those using cloth diapers and five percent of those using disposable diapers flush fecal matter before disposal (or vice versa). Finally, individual consumers do not have the knowledge needed to evaluate the information they receive.[296] These three information imperfections are particularly troublesome for consumers who are attempting to select environmentally preferable products. Not only is it difficult for consumers to assess a product's environmental attributes, most consumers would be unable to properly interpret the information even if it was presented to them.[297]

Eco-labeling and environmental certification programs provide a market oriented approach to addressing the three information deficiencies identified by EPA. According to

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[293] *Id.* EPA Determinants, *supra* note 229, at 1.
[294] *Id.*
[295] *Id.*
[296] *Id.*
[297] *Id.*

the agency, environmental labeling programs theoretically affect consumer behavior in the following ways:

1) An independent third party first develops criteria for environmentally preferable products by category, and then evaluates products to determine their absolute and relative (to other products within the same product category) environmental burdens during manufacture, use and disposal.[298]

2) This complex information is presented in simplified form on a product label.[299]

3) Consumers can then incorporate the environmental attributes as presented on the label with conventional attributes, such as price, quality, and convenience, to evaluate the products. To the extent that consumer demand for products with fewer environmental burdens exists, the market share of these products will increase, all else being equal.[300]

4) In response, companies manufacturing competing, but less environmentally preferable, products may reformulate their products as a competitive strategy. Manufacturers may also, for reasons unrelated to consumer demand (such as employee or stockholder relations), seek out an environmental label to distinguish themselves within the marketplace.[301]

Because of their potential to affect consumer behavior, environmental certification programs have become an increasingly common means of pursuing environmental policy goals, both international and national. In its "Status Report on the Use of Environmental Labels Worldwide,"[302] EPA identified fundamental elements which are common to all types of third party product labeling. First, all labeling programs are conducted by groups independent from the marketers. They are considered to be "third party" as opposed to "first party" environmental claims which the marketers make.[303] Second, participation in

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[298] *Id.*
[299] *Id.*
[300] *Id.*
[301] *Id.*
[302] Office of Pollution Prevention and Toxics, United States Environmental Protection Agency, Status Report on the Use of Environmental Labels Worldwide, EPA 742-R-9-93-001, September 1993, at i, [hereinafter EPA Status Report].
[303] *Id.* at ii.

environmental labeling programs can be either voluntary or mandatory.[304] In the United States, participation in such programs is entirely voluntary. Third, labeling programs can be positive, neutral or negative: that is, they can promote positive attributes of products, they can require disclosure of information that is inherently neither good nor bad, or they can require (negative) warnings about the hazards of a product.[305] In addition to identifying fundamental elements common to all types of third party product labeling programs, EPA has further classified the five types or categories of environmental labeling programs. The five categories of programs are: (1) seal-of-approval; (2) single attribute certification; (3) report card; (4) information disclosure; and (5) hazard warnings.[306] Although all five types of environmental labeling are currently being used in the United States,[307] other countries such as Germany, Canada and Japan have focused their attention on federal seal-of-approval approval programs.[308]

A. **Germany**. Introduced in 1977, Germany's "Blue Angel" is the oldest environmental labeling program in the world. Under the German Program, the eco-label is awarded to product categories meeting certain criteria.[309] Launched with the stated goals of: (1) guiding the consumer in purchasing quality products with smaller adverse impacts; and (2) encouraging manufacturers to "develop and supply environmentally sound

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[304] *Id.* at ii.
[305] *Id.*.
[306] *Id.*
[307] *See* EPA Status Report, *supra* note 302.
[308] *Id.* at 11.
[309] *Id.* at 44.

products,[310] the German program has served as a model for most of the seal-of-approval programs which exist today.[311]

During the first step of the decision-making process in the Blue Angel Program, anyone may propose product categories to the Unweltbundesamt, (the Federal Environmental Agency), for consideration.[312] As the agency in charge of environmental protection, the Unweltbundesamt conducts a preliminary scientific review of the product category and drafts the labeling criteria.[313] The Umweltbundesamt then passes the proposals to the Environmental Label Jury (ELJ). Here, representatives from citizen, environmental, industry and union organizations decide whether the proposal should be pursued further. If the decision is favorable, the ELJ orders the Unweltbundesamt to examine the environmental impacts of the product under consideration.[314] Although the Blue Angel Program states that it has always considered the life cycle of the product in establishing the criteria, most of the 75 sets of labeling criteria only focus on a limited number of the product class' attributes.[315] Next, as a screening measure, the German Program uses a simple, qualitative life cycle matrix which addresses the hazardous substances, emissions (air, soil, and water), noise, waste minimization and resource conservation impacts of a product category during production, use and disposal.[316] Expert panels are used to supplement the results of the matrix. If the matrix and the panel

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[310] *Id.* The third purpose of the Program was to use the ecolabel as a "market-oriented instrument of environmental policy.

[311] EPA Status Report, *supra* note 302, at 44.

[312] *Id.* at 45. Most of the proposals are submitted by manufactures seeking Blue Angel ecolabels for their products.

[313] EPA Life Cycle Assessment, *supra* note 234, at 17.

[314] *Id.* The Jury orders between five and fifteen of these tests per year. *See* EPA Status Report, *supra* note 306, at 45.

[315] EPA Life Cycle Assessment, *supra* note 234, at 18.

[316] *Id.* The matrix also addresses fitness for use and safety.

of experts do not provide sufficient information to develop the criteria, a life cycle assessment will be performed.[317] Quantitative life cycle assessments are only performed under the Blue Angel Program to define the scope of the product category and to identify the life cycle stages which have the most significant impact.[318] This information is then used to develop product criteria.

Once the criteria have been drafted, the proposal is discussed during a closed session of the German Institute of Quality Assurance and Labeling (RAL), a non-government, non-profit organization consisting of experts from consumer, environmental, manufacturing and trade union organizations.[319] The RAL panel of experts critiques the ecolabel proposal and sends it back to the Environmental Label Jury for further review. The ELJ can accept, reject or amend the proposal.[320] If the ELJ cannot reach a consensus, the decision will be made by majority rule.[321] Once the ELJ reaches a decision, this step is completed. The Blue Angel program is rather efficient. New product criteria can be developed in six to twenty-four months. As a result, between three and six new product categories are approved each year.[322] Once the award criteria have been drafted and approved, a manufacturer can begin the application process by submitting a fee of 300 Deutchmarks. If the product meets all of the requirements, RAL and the manufacturer enter into a civil contract which defines the appropriate use of the label.[323] The manufacturer may only use the Blue Angel logo on the approved product itself and in

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[317] *Id.*
[318] *Id.* at 19.
[319] EPA Status Report, *supra* note 302, at 46.
[320] *Id.*
[321] *Id.*
[322] *Id.*. In addition to an application fee, manufacturers must also pay an annual fee based upon product sales, and a mandatory contribution to the Blue Angel's Advertising Fund.
[323] *Id.*

direct advertisement of that particular product.[324] Direct violations of the contract can result in enforcement action being taken by RAL. Other unauthorized uses of the logo are addressed by the Unweltbundesamt. The award is valid for a maximum of three years, after which time the manufacturer must reapply for the ecolabel.[325] Although Germany's Blue Angel Program is the oldest, it may not be the most stringent. It is one of the few programs that does not require manufacturers to demonstrate that they are meeting national environmental standards during the production process.[326]

The German government views the ecolabel as a "soft instrument" of environmental policy. As such, the program cannot establish binding requirements or bans. Moreover, participation in the program is completely voluntary.[327] In spite of its voluntary nature, the Federal German Minister nevertheless believes the program has been successful.[328] There are those, however, who are less appreciative of the Blue Angel Program. The program has been criticized as attempting to select the single most important environmental criterion that will allow comparison with other products.[329] By limiting the criteria in that manner, products with equivalent or superior overall environmental performance may be excluded from the scheme entirely.[330] Thus,

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[324] *Id.* Manufacturers cannot use the logo to imply that other products have been reviewed by Blue Angel or that other products have been awarded an ecolabel.
[325] *Id.*. The validity period may be shorter for products whose technology is advancing rapidly.
[326] EPA Life Cycle Assessment, *supra* note 234, at 19.
[327] EPA Status Report, *supra* note 302, at 44.
[328] *Id.* The Federal Minister for the Environment attributes the success of Blue Angel to "the growth of environmental awareness on the part of consumers and producers." (Umweltbundesamt 1990) In a 1988 survey of 7500 German households, 79 percent were at least familiar with the ecolabel, and 68 percent correctly linked the ecolabel with the concept of environmental protection.
[329] Church, *supra* note 8, at 316.
[330] *Id.*

consumers may be mislead into believing that only the best products have been given the Blue Angel logo when, in fact, quite the opposite may be true.[331]

B. **Canada**. Canada's "Environmental Choice " Program has been in place since 1988.[332] The impetus for the program was growing consumer interest in environmental issues in the wake of two reports issued by the Organisation for Economic Cooperation and Development and the Canadian Council of Resource and Environmental Ministers, respectively.[333] Funding for the government-based program is provided by Environment Canada, the nation's federal environmental agency.[334] Responsibility for the operation and activities of the Environmental Choice Program lies with the Minister of the Environment.[335] At the heart of the Program are five principles which are used to help rank product categories and to determine the technical criteria a product must meet in order to be considered a good environmental choice.[336] The five principles are to:

- encourage the efficient management of renewable resources to ensure their availability to future generations;
- promote the efficient use of non-renewable resources, including fossil fuels; facilitate the reduction, reuse and recycling of industrial, commercial and consumer waste;
- encourage the protection of ecosystems and species diversity; and
- encourage the proper management of chemicals in products.[337]

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[331] *Id.*
[332] EPA Life Cycle Assessment, *supra* note 234, at 27. The first products did not appear on the shelf until 1990.
[333] EPA Status Report, *supra* note 302, at 50.
[334] EPA Life Cycle Assessment, *supra* note 234, at 27.
[335] EPA Status Report, *supra* note 302, at 50.
[336] *Id.* at 51.
[337] *Id.*

Just as in Germany's Blue Angel Program, anyone may propose a product category for labeling to the Environmental Choice Program staff.[338] In step I of the process, the staff reviews all proposed categories, assesses their potential markets and recommends those with the greatest potential impacts to the Environmental Choice Advisory Board.[339] After reviewing the information submitted by the staff, the independent Advisory Board may accept or reject the recommended categories or request more technical information.[340]

Once the Advisory Board accepts a product category, it engages a consultant to develop a detailed assessment of the product category. This assessment, which is called a "briefing note," includes an environmental review spanning the product's life cycle, a profile of the industry, and an assessment of potential economic impacts.[341] Unlike a complete life cycle assessment, the Environmental Choice Program's life cycle review does not involve a formal, quantitative assessment.[342] Rather, it attempts to perform a thorough quantitative review of each stage of the life cycle to identify the most significant environmental impacts of the product. These impacts will serve as the basis for the product's labeling criteria.[343] The draft criteria are released for a 60-day public review

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[338] *Id.* Anyone includes business, industry, Advisory Board members, the general public, program staff, and other interested parties.

[339] EPA Life Cycle Assessment, *supra* note 234, at 27.

[340] *Id. See* EPA Status Report, *supra* note 302, at 50. The Environmental Choice Advisory Board is an independent volunteer which oversees the development of the Environmental Choice Program. The sixteen member group, selected by the Minister, has expertise in a variety of areas such as science, environmental advocacy, health, manufacturing, retailing, law, communications and economics.

[341] *Id.* at 52. The economic assessment impacts include a review of the consumer market for the relevant product type.

[342] EPA Life Cycle Assessment, *supra* note 234, at 28.

[343] *Id.* All labeling criteria are based upon three guiding principles:

- Long-term environmental issues are given precedence, instead of short-term issues that are likely to be addressed in regulations.
- The entire life cycle of the product should be considered, although the criteria developed will not necessarily address all of the product's environmental aspects.
- The criteria set should promote industry leadership by identifying and certifying existing environmentally superior products. EPA Status Report, *supra* note 302, at 52.

period.[344] Comments from the public may be incorporated into the final draft guideline which will be presented to the Board and the Minister for consideration and approval.[345]

After the guidelines have been approved in final form, manufacturers may apply to have their products or services certified. Only certified products can bear the Program's Ecologo.[346] Obtaining certification under the Canadian Program appears to more difficult than under the German Blue Angel Program. Manufacturers who wish to receive the EcoLogo must first submit an application to the Environmental Choice Program. Next, a Technical Agency inspector visits the plant sites to assess both the products and the processes against Environmental Choice criteria.[347] As a result, the Canadian program appears to be more stringent than the German program. If the manufacturer passes the inspection, he is given a license agreement authorizing the use of the EcoLogo. As part of the agreement, the licensee must maintain compliance with the Program's licensing requirements and guideline criteria.[348] In addition, manufacturers who receive a license must pay a fee each year based upon the gross annual sales of certified products.[349] Canada's Environmental Choice Program has received a favorable response from both consumers and industry.[350] Only those products which have a ten to twenty percent market share have the potential of becoming an environmental choice product.[351] If enough consumers do not use a product to generate a sufficient impact on the

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[344] EPA Status Report, *supra* note 302, at 52.
[345] *Id.*
[346] *Id.*
[347] *Id.*
[348] *Id.*
[349] *Id.* at 53. The annual fees currently range from $300 to $5000.
[350] *Id.* at 50. According to a June 1992 survey, 42 percent of consumers recognized the EcoLogo. In addition, a survey conducted among licensees indicated that 71 percent of them either agreed or strongly agreed the Environmental Choice Program licensing was a good business investment.
[351] Church, *supra* note 8, at 317.

environment, even the most environmentally benign Canadian products will not bear the EcoLogo.[352]

C. **Japan**. In February 1989, Japan started the EcoMark program to "recommend environmentally friendly products to consumers and contribute to environmental protection."[353] Thus, it became the second oldest ecolabeling program in the world. As in the case of the two programs previously discussed, the EcoMark program relies upon the involvement of both governmental and non-governmental participants. It is implemented by the Japan Environment Association (JEA), a non-governmental organization under the guidance of the Environment Agency.[354] The JEA is made up of two committees: the Promotion Committee and the Expert Committee. The Promotion Committee, which is composed of members from academia, local governments and industry, approves the guidelines for the programme's operation and selects the appropriate product categories and criteria.[355] The more technically-oriented Expert Committee determines whether applicants qualify for the label.[356]

Unlike the Blue Angel and the Environmental Choice programs, the EcoMark's procedures do not require a life cycle assessment. Instead of performing detailed environmental evaluations of product classes, four general criteria are used to select

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[352] *Id.*

[353] EPA Status Report, *supra* note 302, at 56. EcoMark has several goals:

- Heighten the environmental awareness of consumers,
- Recommend products which contribute to environmental protection and conservation,
- Symbolize an "ecological" lifestyle, and
- Promote "clean "innovation by industry. (Environmental Data Services, 1989)

[354] EPA Life Cycle Assessment, *supra* note 234, at 34.

[355] EPA Status Report, *supra* note 302, at 57. The Promotion Committee is a nine member committee with representatives from consumer, manufacturing, industry and distribution groups, the Environment Agency, the National Institute for Environmental Studies, and local governments.

[356] EPA Life Cycle Assessment, *supra* note 234, at 34.

product categories for labeling.[357] As a result, only products which: (1) incur a minimal environmental burden when used; (2) improve the environment when used; (3) incur a minimal environmental burden when discarded after use; and (4) contribute to environmental preservation in other ways are awarded the EcoMark.[358] However, additional criteria must be met in order for a product to be approved.[359]

Even with the additional criteria, EcoMark's award process is much simpler than any other seal-of-approval program. It is therefore more expedient and less expensive to operate.[360] In exchange for this increased efficiency, the program does not contain a process for public comment[361] and it is less stringent.[362] Once the Promotion Committee selects the product categories and, in consultation with the Expert Committee, establishes the criteria, product applications will be accepted.[363] Manufacturers seeking the EcoMark must submit certain relevant information to the Expert Committee which may, in turn, request further testing by a third party.[364] Thus, Japan's program seems to place more responsibility on the manufacturers themselves. In the event a product is given an award, the recipient signs a contract with the Japan Environment Association, which certifies use of the logo for two years.[365] Unlike other enviro-certification programs, EcoMark does not require an application fee or an advertising fee. Consequently, it is often the least

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[357] *Id.*
[358] EPA Status Report, *supra* note 302, at 56 citing Hashizume, (1992c).
[359] EPA Life Cycle Assessment, *supra* note 234, at 35. The additional criteria are: (1) appropriate pollution control measures at the production stage; (2) ease of treatment for disposal of product; (3) energy conservation during use of the product; and (4) price not extraordinarily higher than comparable products. (Citing Hashimoto 1990.)
[360] EPA Status Report, *supra* note 302, at 58.
[361] EPA Life Cycle Assessment, *supra* note 234, at 34.
[362] EPA Status Report, *supra* note 302, at 58.
[363] *Id.*
[364] EPA Life Cycle Assessment, *supra* note 234 at 34.
[365] EPA Status Report, *supra* note 302, at 60.

expensive program for manufacturers.[366] Moreover, even the fee charged for use of the logo is less expensive than those charged in other countries.[367] In spite of the low fees, the EcoMark program is the only government-related environmental certification program that is self-financed.[368] By comparison, the EcoMark appears to have less impact on the public than the award programs in Germany and Canada.[369] The Japanese program has been described as one which emphasizes consumer information rather than fostering competitive incentives to improve the environment.[370] To its credit, the EcoMark program simply uses a label to identify environmentally friendlier products without regard to current market share. In theory, products bearing the EcoMark logo will receive an increased share of the market thereby forcing competitors to improve the environmental aspects of own their products.[371] This appears to be in opposition with the Canadian approach which only awards its label to products which have already gained a certain share of the market.

D. **Green Seal**. At present, there are two environmental certification programs in the United States, Green Seal and the Scientific Certification Systems.[372] According to its own literature, Green Seal is "the national, nonprofit environmental labeling organization that awards a seal of approval to products that cause significantly less harm to the

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[366] *Id.*

[367] *Id.* In other countries the use fee is based upon the number of units sold or the market share.

[368] EPA Status Report, *supra* note 302, at 57.

[369] *Id.* A July 1990 opinion poll conducted by the Prime Minister's Office indicated that only 22 percent of those polled were even aware of the program. As a result of the low recognition factor and the small number of approved products, few consumers look for the EcoMark [logo] when they shop. (Hashizume, 1992c).

[370] Church, *supra* note 8, at 317.

[371] *Id.*

[372] The Scientific Certification System was formerly called Green Cross. Although it is commonly referred to as a third party certification program, the Scientific Certification System really focuses more on information disclosure.

environment than other similar products."[373] To that end, Green Seal develops environmental standards for consumer products using a public review process which includes consumer groups, environmental organizations, manufacturers and government agencies.[374] A small organization with only 14 employees, Green Seal does not have the means to test products on its own. Instead, Green Seal has a standing contract with Underwriter Laboratories (UL) which serves as its primary testing and inspection facility.[375] When Green Seal initiated the program in 1990, the organization intended to conduct life cycle assessments for the product categories it planned to test.[376] Because of the expense involved and the lack of consensus on how life cycle assessments should be performed, Green Seal decided to use an "Environmental Impact Evaluation" (EIE) for each product.[377] The EIE, which is a shortened or "streamlined" life cycle assessment, is designed to highlight the most important environmental impacts of a product's life cycle. Once the EIE is completed, Green Seal sets proposed standards[378] for the most important points in the extraction, manufacturing, distribution, use and disposal stages of a product's life.[379] The proposed standard is then sent out for public comment.[380] Green Seal's "endorsement" of products goes beyond environmental concerns. In addition to meeting the standards set by the organization, Green Seal will not consider products for

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[373] Green Seal promotional literature, undated.
[374] *Id.*
[375] EPA Status Report, *supra* note 302, at 72. UL, which was founded in 1898, has 3,800 employees who conducted more than 74,000 product evaluations in 1990. They have more than 500 field representatives inspecting factories in 74 countries.
[376] *Id.* at 73.
[377] EPA Status Report, *supra* note 302, at 73.
[378] Green Seal sometimes seeks UL's assistance in designing the standards. In some cases, it will set up advisory panels to help develop specific standards. EPA Status Report, *supra* note 302, at 73.
[379] EPA Status Report, *supra* note 302, at 73.

certification unless they also meet or exceed applicable safety and performance standards, as well as all applicable environmental regulatory requirements.[381] UL conducts the necessary tests and inspections to determine whether a manufacturer's product meets the standards Green Seal has set.[382] Once the established standards have been met, Green Seal will award the use of its logo. A manufacturer may only use the Green Seal logo on the product itself or in an advertisement specifically related to that product.[383] The Green Seal Program requires manufacturers to pay two fees: an initial testing fee and an annual monitoring fee.[384]

E. **Scientific Certification Systems**. The more objective of the two U.S. programs is that of Scientific Certification Systems (SCS). SCS describes its approach as follows:

> Rather than set arbitrary standards for what is "green" or offer a "seal of approval" which can mask significant environmental tradeoffs and stifle innovation, SCS developed the Environmental Report Card to provide detailed information about the environmental profile of a product, based on a life cycle or "cradle to grave" study of the product and its packaging.[385]

According to SCS, its Environmental Report Card introduces consumers to the important concept of environmental burdens.[386] To determine a product's environmental burdens SCS performs an inventory analysis, which is the first step of a life cycle assessment, to measure the resource depletion, energy use, air and water pollution, and solid waste

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[380] *Id.* Green Seal seeks comments from manufacturers, trade associations, environmental and consumer groups, government officials, and any member of the public who wish to participate Anyone who disagrees with Green Seal's decision can take the matter on appeal to an Independent Standards Council.
[381] *Id.*
[382] *Id.* at 74.
[383] *Id.*
[384] *Id.*
[385] Scientific Certification Systems, *Harnessing the Power of Science and the Marketplace for a More Sustainable Future.*
[386] *Id.*

generation associated with a product from raw material extraction through product disposal.[387] This detailed process of inventory analysis requires the use of a model consisting of two parts: (1) a data-base containing information for more than 2,000 industrial processes; and (2) a computer program which calculates input and output values for each unit operation from "cradle to grave."[388] All of this information is then incorporated into an Environmental Report Card which can be described as follows:

> Once the LCI has been completed, the results are presented in the Report Card label, which consists of a bar graph, with an entry for each category of environmental burden. Displayed on an exponential scale, the bar graph documents the "environmental burden" of the labeled product by displaying a bar for each of the 20-odd different environmental impacts that are measured. The bars run horizontally across the page, with the smaller bars indicating "less" environmental burden and longer bars indicating "more" environmental burden. Also included on the label are the numerical values for an impact category, which may range anywhere from zero (e.g., 0 kg of carbon dioxide released) to some highest value as determined by the product which is the most offensive in that particular category.[389]

Certain products carry a Report Card documenting the environmental burdens associated with a product. As a frame of reference, SCS also shows the consumer an Environmental Report Card for a "typical" product in the same category.[390]

In spite of their efforts to allow the consumer to make the decision, SCS's Environmental Report Card nevertheless runs the risk of confusing consumers. For example, a consumer may look at two products for which Report Cards have been prepared. The bar documenting the amount of unclassified water pollution on one chart is twice as long as corresponding the bar for the other product.[391] To the average consumer,

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387 Scientific Certification Systems, T*he Science of Life-Cycle.*
388 *Id.*
389 EPA Status Report, *supra* note 302, at 145.
390 Wynne, *supra* note 5, at 79.
391 *Id.*

the longer bar indicates a greater environmental burden and possibly, the less desirable product.[392] Such may not be the case however. A bar depicting 100 hundred grams of unclassified water pollution could be twice as long as one depicting 10 grams, and one-half the length of the 10,000 gram bar.[393] It all depends upon whether the unit of weight is expressed in grams, kilograms or milligrams.[394] This difference is critical because the chart on the Environmental Report Card specifically tells consumers that the shorter bars mean "Better: Lower Burden," while the longer bar means "Worse: Heavier Burdens."[395] Although the scale of measurement is clearly presented at the bottom of the graph, in all likelihood most consumers will not read the label closely enough to notice this critical difference.[396] Therefore, it may be difficult for the "reasonable" consumer to accurately compare the environmental burdens of one product with those of another under the SCS approach. SCS charges its clients for testing services,[397] but does not impose licensing or royalty fees.[398]

While both Green Seal Scientific Certification Systems are frequently mentioned in articles discussing environmental marketing issues, only one author analyzes the two programs in any depth.[399] According to other commentators, Scientific Certification and

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[392] *Id.*
[393] *Id.*
[394] *Id.*
[395] *Id.* at 79-80.
[396] For a more detailed explanation of the weaknesses of the SCS approach, *See* Wynne, *supra* note 5, at 73-83.
[397] Scientific Certification Systems, *Harnessing the Power of Science . . .*
[398] EPA Status Report, *supra* note 302, at 149.
[399] *See* Wynne, *supra* note 5 at 83-92. In his article "The Emperor's New Eco-Logo: A Critical Review of the Scientific Certification Systems Environmental Report Card and the Green Seal Certification Mark Programs," Roger Wynne offers an insightful assessment of certification programs and the consumers they attempt to serve. In spite of the subjectivity Green Seal uses in defining product categories and setting standards, as well as the discretion it exercises in awarding the seal to manufacturers, Wynne nevertheless views the program quite favorably. His only real concern seems to be the power Green Seal holds by not allowing third parties to verify or challenge its decisions concerning individual

Green Seal are in competition with one another.[400] Yet, there is disagreement on what impact this competition will have on the market. In truth, Green Seal and Scientific Certification Systems each has its own advantages.[401] Consumers who prefer to rely on the judgment of environmental groups are likely to favor Green Seal.[402] To them, the seal merely means that the product has been reviewed.[403] On the other hand, consumers who do not wish to defer to the anyone else's judgment or who distrust such organizations may be more comfortable with Scientific Certification Systems' Environmental Report Card.[404] Thus, the programs arguably meet the needs of different consumers. Whether or not Green Seal or Scientific Certification (or both) can survive may ultimately depend upon the type of environmental information the consumer and the market demand.[405]

The successful third-party consumer product labeling program will presumably serve three important functions in the marketplace: (1) it will provide independent evaluation and endorsement of a product; (2) it will act as a consumer protection tool; and (3) it will be a means of achieving specific policy goals (environmental and

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manufacturers. If, he concludes, interested parties maintain a careful watch, Green Seal's Certification Mark could become an "effective tool for influencing the purchase decisions of green and latent green consumers, and thus for stimulating some changes from manufacturers eager to expand or protect market share." On the other hand, Wynne views SCS with much more skepticism. Even though SCS claims to present objective information, its methodology for evaluating products' environmental burdens, in his opinion, the process is riddled with qualitative judgments. More importantly, according to Wynne, SCS's Report Card will probably not cause a shift in consumer demand without which manufacturers will not be compelled to change their ways. In essence, he finds the Report Card to be fatally flawed as a means of correcting a dysfunctional green consumer market.

[400] Church, *supra* note 8, at 290. According to the author, "The Environmental Defense Fund has charged that manufacturers use the Scientific Certification label in a "manner likely to mislead or confuse consumers." The president of Scientific Certification countered that these charges merely attempted to eliminate Green Seal's Competition. noting that two members of Green Seal's board of directors occupied influential positions in the Environmental Defense Fund."

[401] Church, *supra* note 8, at 291.

[402] *Id.*

[403] *Id.*

[404] *Id.*

[405] *Id.*

otherwise).[406] In order for any certification program to achieve these functions, it must first be offered by a credible source.[407] Moreover, it must be understood by the public as part of a broader information campaign which links the public's understanding of environmental issues with product choices.[408] Finally, the third party certifiers themselves must set and maintain high standards in awarding their certification marks.[409] If the information generated by environmental certifiers is a public good, as one commentator suggests, then private certifiers must charge reasonable prices for their services.[410] Unless they can recover their costs, certifiers may be compelled to reduce evaluation standards or eliminate critical components which make certification effective.[411]

The environmental certification programs in Germany, Canada and Japan represent a different philosophy toward the environment. Unlike the United States, the leadership in those countries has decided to use environmental marketing as a means of carrying out environmental policy. Unwilling to rely upon their markets to provide consumers with less harmful products, the respective governments have stepped in to ensure that consumers have the means to tell at a glance which products have the least impact on the environment. Arguably, each program is as stringent as their industries will permit. None of the programs are mandatory. Therefore, the ultimate decision of whether or not to participate remains with the individual manufacturers.

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406 EPA Determinants, *supra* note 234, at 8.
407 *Id.* at 94.
408 *Id.*
409 Grodsky, *supra* note 136, at 204.
410 *Id.* at 217.
411 *Id.*

It is particularly interesting to note that Japan's EcoMark Program, which is the most efficient and the most cost effective, also has the least recognition among consumers. Under Germany's less stringent Blue Angel Program, manufacturers are able to qualify for the logo without demonstrating that they are in compliance with the other environmental laws.

In some respects, the Canadian Environmental Choice Program is the most rigorous. In order to be awarded the EcoLogo, manufacturers must not only demonstrate that their products meet the qualifications, but they must also be in compliance with the nation's environmental laws. Yet, because products must have a certain share of the market in order to be eligible for the EcoLogo, consumers may be mislead into thinking that only the most environmentally sound products are receiving the award. Even a cursory review of these programs leads to some interesting conclusions: (1) there is more than one approach to environmental certification programs; (2) every program involves tradeoffs; and (3) even minimal attempts to assess the environmental impacts of products is better than none at all.

By contrast, the United States has two independent environmental certification programs, neither of which is affiliated with our federal government in any manner. This lack of affiliation may well turn out to be their greatest strength. With the current emphasis on deregulation, consumers might have an adverse reaction if they felt the government was now trying to tell them which products to buy. In all likelihood, consumers will not be inclined to purchase so called environmentally preferable products unless they think it was their own idea in the first place. Those consumers who are

independent enough to seek such products will probably be more confident in their decisions if they have more than one assessment tool at their disposal. Whether or not the consumers actually take advantage of both programs is almost irrelevant. Merely having a choice is significant in and of itself. Thus, there may be ample room in the market for both Green Seal and Scientific Certification Systems.

There is another advantage to having more than one environmental certification program. Subjecting all products to exactly the same method of assessment may not yield the best results. For example, the streamlined "Environmental Impact Evaluation" which Green Seal employs may be better suited to measure the impacts of a lawn and garden product than it is to measuring the impacts of a piece of yard equipment. The assessment of a lawnmower, which has steel components, may require a more in depth analysis such as that performed by Scientific Certification Systems. Finally, there is yet another advantage of having multiple environmental certification programs. The competition which is almost certain to arise between the two programs will help ensure that the standards for measuring products' environmental impacts remain at a high level. Otherwise, in the absence of outside monitoring, a single certifier might be inclined to relax its standards in order to expedite the certification process.

VII. Paradigm for Regulating Green Marketing

A solution to the current environmental marketing dilemma will not be the result of a single agency's efforts. Nor is it likely to come about as a result of specific piece of legislation enacted by Congress. The "ideal" environmental marketing program must have something for everyone. That is, it must: (1) provide incentives for industry; (2) be easily understood by and useful to consumers; (3) have the capacity to be implemented and enforced on a federal level; and (4) have enough substance to draw support from environmentalists. Such an eclectic approach goes beyond the German, Canadian and Japanese environmental certification programs.

A. Incentives for Industry. To be effective, the program must first have the cooperation of manufacturers who have reduced the impact their products upon the environment. When consumers reject environmental marketing claims, they do not distinguish between those which are accurate and those which are not. Therefore, honest manufacturers are harmed when deceptive claims are allowed to exist within the market. Presumably, these members of industry would more than willing to help develop a mechanism whereby consumers can easily identify products which truly are better for the environment. Industry could assist in a number of ways. First, as experts in manufacturing processes, they can: (1) provide insight into which adverse environmental impacts can be realistically reduced; (2) offer suggestions as to how those impacts can be measured; and (3) serve as a sounding board for any technical definitions which EPA might develop. Perhaps most importantly, these manufacturers could serve as a counterbalance to the complaints that are likely to arise from less scrupulous businesses.

With the support of key manufacturers, the agencies would be better equipped to respond to the almost certain pressure members of Congress will apply on behalf of their disgruntled constituents. Congress is more likely to respond favorably to the comments of other businesses than it is to the opinion of a regulator.

B. The Consumers. Just as the success of an environmental marketing program is highly dependent upon industry, it is also highly dependent upon consumers. After all, industry only produces the items. It is the consumers who purchase them. In designing a program which is useful to consumers, there are several things to keep in mind. First of all, one size does not fit all. That is to say, not all consumers make their purchasing decisions in the same way. Some of them will not look beyond the "green" claims which manufacturers make about their products. Thus, there will always be a need for the FTC to ensure that advertisements are not misleading.

Second, the program will need to provide a means for the consumers who look beyond the claims to identify the products which have the least impact on the environment. Arguably, the most effective and efficient means of communicating this information is through seals-of-approval or some other type of environmental certification program. If the seals or certifications are to be meaningful to consumers, they must come from a credible source. This essentially eliminates any industry sponsored seals or certifications because they would not be objective enough. On the other hand, any government program would likely suffer from the opposite problem. In order to be "fair" to each manufacturer in every industry, a government-sponsored program would have to be so objective as to be almost meaningless. The information must therefore come from an

independent third party, such as Green Seal and Scientific Certification Systems. Finally, a program which is effective from the consumer's point of view would be designed to accommodate a third category of consumers--those who wish to choose between environmental tradeoffs (or attributes) themselves. Consumers are only going to trust a program which allows them to make their own decisions. They are not likely to believe in a program in which the government makes all of the decisions for them. Therefore, there should be plenty of opportunity for both Green Seal and Scientific Certification Systems to participate.

C. Environmental Groups. Environmental groups can serve two functions in the model for regulating environmental marketing As representatives of the "reasonable consumer," environmental groups provide a unique perspective on the environmental marketing problem. In addition, these groups can fulfill the critical role of educator. Once again, in order to make purchasing decisions which are better for the environment, consumers need information. In my opinion, consumers need more than information. They need to be educated on a number of key issues. First of all, consumers need to learn that there is no free lunch. No matter how small an item may be, manufacturing that product impacts the environment adversely. As consumers become more familiar with this concept, they will logically begin to ask: what are the environmental impacts of the product which I am considering purchasing? This question leads quite naturally to an explanation of concept of life cycle assessments. Even though there is a great deal of controversy as to how these assessments should be conducted, they are still the only means we have of measuring a product's environmental impacts. Thus, they serve a dual

role of informing consumers and protecting the environment. There is, however, one danger which must be avoided at all costs. It is critical that life cycle assessments not be presented to the American public as a perfect, scientifically accepted tool. One can only imagine how the those who are opposed to a more stringent environmental marketing program would attempt to discredit the entire approach by attacking the inherent weaknesses of the life cycle assessment concept. This must not become another area in which experts merely cancel each other out. If consumers are not told the complete truth about life cycle assessments from the beginning, then the entire program is doomed to fail.

Finally, environmental groups must educate consumers about the seal-of-approval and certification programs which currently exist in the United States. Few citizens have ever seen a "green seal" or a "Environmental Report Card" on any product which they have purchased. While it is true that the government cannot force manufacturers to seek the approval/certification of either Green Seal or Scientific Certification Systems, the market itself may nevertheless provide incentives for the industry to use those services more. For example, if honest manufacturers begin to claim that product X has been awarded a "green seal," a statement which will have meaning to consumers as a result of environmental groups' education programs, then the same competitive pressure which caused some manufacturers to make environmental claims in the first place should cause them to seek the seal as well. Theoretically, two things will occur: (1) consumers will have a greater selection of environmental products available; and (2) the environment will be better protected and preserved.

D. Federal Implementation. The model proposed in this thesis intentionally minimizes the role of the federal agencies. The current political climate in not conducive to greater federal involvement. Therefore, any attempts to regulate green marketing must be done within the parameters of current law. For example, the FTC could invite industry representatives, environmentalists and EPA to participate under its authority to regulate deceptive advertisements. The entire process could be initiated as part of the FTC's triennial review of the Guides. EPA's job would be to convert the technical information submitted by environmentalists and industry representatives into language which the FTC could incorporate into the Guides. Neither of these actions would require an expansion of either the FTC's or EPA's authority through further Congressional action. Instead, the regulators could capitalize upon tools which already exist. Assuming the format of the Guides remained the same, the Commission's examples of acceptable environmental claims could be drawn more from the success stories of the products that have been awarded the Green Seal logo or a Scientific Certification Systems' Environmental Report Card. All in all, this would be a much more subtle, yet potentially effective, means of regulating environmental marketing claims.

If this approach is indeed going to be successful, several basic principles must be followed. First all of the participants must be willing to compromise. If any participant attempts to put its own interests above the interests of the group, the manufacturers who engage in deceptive advertising will be able to conduct business as usual. Next, the participants must allow the program time to develop. They should start with products whose environmental impacts are relatively easy to assess. Once a methodology has been

developed and a level of trust established, the participants will be better equipped to address more complex manufacturing processes. Even though a spirit of cooperation should prevail, someone must take the lead. In these circumstances, EPA should assume that role along with representatives from non-governmental groups. Joint sponsorship should diffuse any arguments that the program was conceived by federal regulators. If all goes well, EPA should have a better idea of how to approach the problem as a result of its new responsibilities under E.O. 12873. Above all, the participants must be patient. There may only be one chance to influence consumers through environmental certification programs. As such, it is critical to get it right the first time.

Conclusion

Consumers may not be as easily influenced by environmental marketing claims as some would like to think. When asked whether they believed the environmental claims companies were making, nearly 47 percent of the consumers surveyed said they generally dismiss environmental claims as "mere gimmickry."[412] Moreover, consumers do not believe that the brands advertised as environmentally benign are really any better for the environment.[413] Even if the FTC was able to draft "perfect" environmental marketing guides, there is no guarantee that manufacturers would produce better products. Because of its limited resources and lack of credibility, EPA's ability to ensure that consumers receive the information they require is just as limited. For these and other reasons, the debate over how environmental marketing should be regulated will continue to rage.

Clearly, consumers need information about products' attributes in order to select the items which have the least impact on the environment. The academics who only see the consumers as helpless victims feel strongly that the federal government should control the manner in which manufacturers are allowed to advertise their products. To many of them, the ideal solution would be to have EPA develop binding regulations for the FTC to enforce. As a practical matter, it is highly unlikely that anything that drastic is going to occur. In the current political climate EPA's continued authority to regulate the nation's air and water is in serious jeopardy. Therefore, any notion that EPA's authority should be expanded to reach environmental marketing claims is almost beyond comprehension. The public's reported dissatisfaction with the federal government's inability to resolve difficult

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[412] EPA Evaluation, *supra* note 2, at 22.
[413] *Id.*

issues, such as the federal deficit and welfare reform, places the success of any new federal program in doubt.

In reality, the only way that consumers will be provided the information they need is if an environmental certification program is put into place. In my opinion, the basic tools to develop such a program already exist. There is no need to seek new legislation or an expansion of the FTC's and EPA's administrative authority. Instead, the interested parties, both governmental and non-governmental, must use their collective expertise and experiences to develop a certification program that can be easily recognized and used by consumers. Political rhetoric to the contrary, the American people do care about their environment. If given the opportunity and the means, most of them will select products which have less adverse impact on the environment. The solution proposed in this thesis only requires the commitment of a few dedicated people who have a desire to work within the current system. The results of their efforts combined with the willingness of the American consumer to preserve our natural resources for future generations has an almost unlimited potential for success. I am not suggesting that it will be easy to develop such a program. Yet, it could be done if the participants remain focused on their primary objective--to cause manufacturers to change the quality of their products rather than improve the accuracy of their environmental marketing claims.